IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 477

ALLIED PAPER MILLS, *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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December 22, 1948

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Petitioners,

v.

FEDERAL TRADE COMMISSION, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, above-named, respectfully pray for a writ of certiorari to the United States Court of Appeals

for the Seventh Circuit to review a decree of that Court (R. 2293), entered July 26, 1948, affirming and commanding obedience to an order to cease and desist of the Federal Trade Commission issued June 30, 1945 (R. 2247). A certified transcript of the record in this case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with Rule 38(1) of the Rules of this Court.

Statement

This case presents the question whether your petitioners have been afforded such judicial review of the order and findings of the Federal Trade Commission (hereinafter called the Commission) by which they are adversely affected and aggrieved, as they are entitled to have under Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. A. Sec. 1009). Apart from the Administrative Procedure Act, the case presents the further question whether the findings and order of the Commission are supported by substantial evidence.

The pertinent portions of Section 10 of the Administrative Procedure Act are as follows:

> "Right of review
>
> "(a) Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.
>
> • • • • • • • • •
>
> "Acts reviewable
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> "(c) Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. • • •
>
> • • • • • • • • •

"Scope of review

"(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error. * * *"

The Court of Appeals ignored the Administrative Procedure Act in its opinion, and emphasized the limited character of its jurisdiction to review the order and findings of the Commission. 168 F. (2d) 600, 605, R. 2278, 2283. In other words, it proceeded to reach its decision as though the Administrative Procedure Act were nonexistent and failed to avail itself of the powers or to perform the duties prescribed for appellate courts by said Act.

The position of the petitioners is that the Court of Appeals in this proceeding has looked only to the evidence and arguments presented by the Commission, and has

given judicial approval to the Commission's findings and order without reviewing the record and without making an independent determination, based upon its review thereof, that the findings and order are supported by substantial evidence. The Court's decision flies in the face of the intent of the Congress which, as evidenced by the enactment of the Administrative Procedure Act, was to correct injustice and abuses of authority which had grown up in administrative agencies.

Your petitioners urge that the order of the Commission and many of the findings upon which it purports to be based are arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law; that such order and findings are unsupported by substantial evidence; that the Court erred in refusing to hold unlawful and set aside such order and findings; and that your petitioners have thereby been deprived of their right to judicial review.

Prior Proceedings

The Commission's complaint was issued in April, 1939, against the Book Paper Manufacturers Association, several individuals connected therewith, and 45 manufacturers of book paper. During the complaint period the petitioners comprised 50% of the companies operating in the book paper industry, and did approximately 80% of the total business of the industry in terms of tonnage (R. 110). The principal charge contained in the complaint was that the respondents named therein had for several years engaged in a conspiracy to fix and maintain *uniform* prices for book paper which, broadly speaking, is paper that is used in printing books, magazines, leaflets and the like. This charge covered the commercial sale of book papers as contrasted with sales to the government. As to government

business it was charged that petitioners agreed upon the bids to be submitted for governmental requirements. That aspect will be considered in Point II(4) of the accompanying brief. In their answers, the respondents denied the alleged conspiracy in all particulars.

On petition to review and set aside the Commission's order and Findings, the Court of Appeals refused to set aside any of such Findings as to your petitioners, and, as to them, affirmed the Commission's order in its entirety.

The Book Paper Industry

Book paper manufacturing is one of the most highly competitive industries in the United States. It has a low degree of concentration in large units, no company having as much as ten per cent of the business (R. 2227). It does not sell to ultimate consumers but to the large printers, the paper merchants (who, in turn, sell merely to printers) and to converters, who perform some finishing operation before they, in turn, sell the paper.

The great bulk of the product is sold in the limited number of large printing centers of the country of which New York, Philadelphia and Chicago are conspicuous in the East, and Los Angeles and San Francisco in the West.

Fifty-five per cent of the total business is done pursuant to negotiated contracts (R. 2218), *e. g.*, a contract between a mill and a magazine publisher to supply all paper used to print its magazine for two or three years, or longer; the other 45% of the total business is accounted for by spot sales (R. 2218)—28% representing spot sales to merchants (wholesalers), and 17%, sales to classes of purchasers other than merchants (Res. Ex. 61, R. 1867).

The Findings of the Commission and the Disposition Thereof By the Court Below

The complaint in this proceeding did not, as the Court of Appeals stated in its opinion, simply charge your petitioners with "a combination to suppress or restrict price competition and to fix prices" (168 F. (2d) 600, 603, R. 2279-80); nor did it charge that your petitioners, by agreement, instituted and carried out certain practices and activities the tendency and effect of which would be unreasonably to restrain competition. The complaint flatly charged that your petitioners agreed to fix and maintain *uniform prices* at which book, coated and similar papers would be sold, and agreed upon the bids to be submitted to the United States Government for its paper requirements (R. 10). It was further charged that pursuant to said agreement and in furtherance thereof, your petitioners engaged in other cooperative actions and activities, all of which are set forth in Paragraph Seven of the complaint (R. 10-12). There is no direct evidence of the agreement charged.

If the Commission had been able to establish by direct evidence an agreement by the petitioners to fix and maintain uniform prices at which book papers should be sold, the degree of success in carrying out that agreement would have been of no consequence. But without such proof the Commission was under the necessity of establishing the existence of the agreement charged by inference. To do this, the burden rested upon the Commission to establish:

> First, that the prices actually charged for book papers were uniform with inconsequential differences, or that there was an abnormal uniformity of price not consonant with a free market; and

> Second, that the reasonable inference to be drawn from such uniformity or such abnormality, viewed in the light of all the evidence was that such prices were the result of agreement.

The Commission made whatever inferences were necessary to support the charge made and included such inferences in the findings and order by which your petitioners are aggrieved. In doing so the Commission ignored or rejected any evidence which did not serve its preconceived theory of the case and failed to sustain the burden of proof which, in view of the charge set forth in the complaint, rested upon it.

Your petitioners did not obtain redress in the Court of Appeals of the wrong thus done them but were there met—in a proceeding where proof of the basic charge was based solely on inference—with the following statement of law, which in the absence of any direct evidence of conspiracy, must have controlled the Court's decision:[1]

> "• • • We cannot sustain the petitioners contention that where two contradictory and reasonable inferences may be drawn from the *same* evidence the reasonable inference of guilt found by the Commission is not supported by substantial evidence. If the Commission's inference from the facts is reasonable our inquiry ceases" (168 F. (2d) 605, R. 2283). (Emphasis supplied.)

Guided by that principle, which it is submitted, is in conflict with the decisions of this Court and with decisions of other Courts of Appeal, the Court below proceeded to give its sanction to the inferences embodied in the findings and order of the Commission by which your petitioners are aggrieved. Other statements of the Court emphasize its awareness that the Commission's findings

[1] The Court did not state our contention accurately. The point is discussed in the accompanying brief (Point III).

of conspiracy depended upon inferences alone. Thus it said (168 F. (2d) at p. 607, R. 2287):

> "The petitioners argue that there is no substantial evidence to support the finding of the total conspiracy. A combination or conspiracy can be shown by circumstantial evidence. * * *"

Then, after referring to various circumstances from which the Commission inferred conspiracy, but from which same circumstances petitioners contended that other inferences might more reasonably be drawn, the Court concluded (168 F. (2d) p. 607, R. 2287):

> "* * * We cannot say that the Commission's inferences are unreasonable * * *."

In brief summary, the Commission's findings which the Court reviewed in light of its theory of the law above quoted are set forth below.[1] Petitioners will demonstrate fully in their brief that there was either no evidence whatsoever in support of these findings, or that when they were based upon inference, the inference was an unreasonable one because it was refuted by specific and uncontradicted evidence.

(1) The Court rejected the contention of petitioners that there was no substantial evidence that prices were in substantial uniformity and, therefore, that the finding to that effect and according subsidiary findings should be set aside (168 F. (2d) 606, R. 2285). The Commission itself had not made any finding that prices at which book papers were sold were uniform. It found only that the petitioners had "succeeded in maintaining price uniformity to a remarkable degree" (R. 2239). This specific finding as contrasted with a general finding that the effect of the combination was to "define, establish and maintain uniform

[1] A fuller discussion thereof is contained in the accompanying brief.

base prices for book papers" (R. 2246) is of course controlling. The Court below went further—it found that the prices at which book papers were sold were substantially uniform. This subject is fully considered in Point II of the accompanying brief. We need only state, therefore, that this case contains *no evidence* that such prices were substantially uniform or that there was any abnormal uniformity of prices.[1]

(2) The Commission brushed aside in an arbitrary and capricious finding (which was approved by the Court below) highly significant facts presented in the testimony of Professor Edward S. Mason of Harvard University, an economist of the highest standing whose testimony the Commission made no effort to refute. His testimony proved that prices of book paper during the complaint period had moved in accordance with economic trends and had conformed to movements of prices in other industries which were known to be competitive. Such facts compelled the inference that there was not any conspiracy among the petitioners to fix prices, for, in real life, a conspiracy to fix prices means a conspiracy to fix prices at a level different from those which would prevail in a free market.

(3) The Court below adopted the Commission's findings in respect of government business which was a type of business entirely separate and apart from commercial business and so recognized by the Commission. Here again the Commission's conclusion and that of the Court below were predicated on inference.

(4) The Commission "inferred", in the absence of any direct evidence, that the recommendation during N. R. A.

[1] This statement does not apply to bids on Government Printing Office business from 1935 to 1937. See Point II(4) of the accompanying brief.

by the Code Authority (consisting largely of members of the Executive Committee of the Association) that the zoning method of pricing (which has been followed, as the Court below found, "with varying uniformity" by petitioners), be included in a proposed code, "necessarily involved discussion of and agreement upon the territorial areas to be included in each zone and the price differentials to be made applicable in each" (R. 2222). The zoning system so recommended by the Code Authority was exactly that which the Commission itself found had been inaugurated by The Champion Paper and Fibre Company (R. 2222). The only discussion possible, therefore, by the Code Authority was whether Champion's zoning system should be recommended for inclusion in a proposed code. The Commission further found that the zoning method of pricing was continued after the N. R. A. period by "mutual consent" (R. 2223). In Point II of our brief we shall demonstrate that such finding is nothing more than a play on words.

(5) While admitting that the record does not show when the quantity differentials appearing in petitioners' price lists were established, the Commission inferred and concluded that such differentials were established as a result of cooperation and understanding among the petitioners (R. 2226). The Court below accepted this inference (168 F. (2d) 608, R. 2288). Similarly, the Commission admitted that there was not any "specific showing" as to the origin of grade differentials, but nevertheless it found that certain exhibits (which are obscure and unintelligible) "strongly suggest" that such differentials were the result of cooperative action among the petitioners. The Court below did not mention grade differentials, but in view of its acceptance of the Commission's inference regarding quantity differentials, that would seem to indicate oversight rather than disagreement.

(6) Other inferences of the Commission, equally unsupported by substantial evidence, are discussed in the accompanying brief (Point II).

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1254(1), 1651(a) and 2101. The decree of the Court of Appeals for the Seventh Circuit to be reviewed was entered July 26, 1948 (R. 2293). By order of this Court dated October 6, 1948 the time of petitioners to file a petition for a writ of certiorari was extended to December 23, 1948 (R. 2298-99).

The Questions Presented

1. Whether the Court of Appeals granted such review of the order and findings of the Commission by which your petitioners are aggrieved as is required under Section 10 of the Administrative Procedure Act.

2. Whether the findings and order of the Commission by which your petitioners are aggrieved are supported by "substantial evidence" within the meaning of Section 10 of the Administrative Procedure Act.

3. Whether, apart from the Administrative Procedure Act, the findings and order of the Commission by which your petitioners are aggrieved are supported by "substantial evidence".

4. Whether the Court of Appeals erred in its definition of "substantial evidence".

Reasons Relied on for Allowance of the Writ

1. The Court of Appeals, in ignoring and refusing to apply the provisions of Section 10 of the Administrative Procedure Act has, by negation, erroneously decided important questions of Federal law which have not been, but which should be, settled by this Court—namely, the scope of judicial review and the meaning of "substantial evidence" under the Administrative Procedure Act.

2. In holding that where two contradictory and equally reasonable inferences may be drawn from the same evidence, the inference (contrary to other undisputed evidence) drawn by the party having the burden of proof is supported by "substantial evidence", the Court below rendered a decision in conflict with decisions of this Court and with decisions of other Courts of Appeals on the same matter.

3. In conducting its review of the findings and order of the Commission by which your petitioners are aggrieved, the Court below so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departure by the Federal Trade Commission, as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Seventh Circuit, sitting at Chicago, Illinois, commanding said Court to certify and send to this Court, on a day to be designated, a full and complete transcript of the record of all proceedings heretofore had in this cause, to the end that this cause may be reviewed and determined by this Court; that the decree of the Court of Appeals be reversed; and that your petitioners be granted such other and further relief as may seem proper.

ALLIED PAPER MILLS, *et al.*,
Petitioners,

By

WILLIAM W. CORLETT,
Attorney for Petitioners other than The Champion Paper and Fibre Company

ALFRED MCCORMACK,
Attorney for Petitioner The Champion Paper and Fibre Company

December 22, 1948

BRIEF IN SUPPORT OF THE PETITION

Decisions Below

The findings and order of the Commission are reported at 40 F. T. C. 696, 706 (R. 2207-50). The opinion of the Circuit Court of Appeals is reported at 168 F. (2d) 600 (R. 2278-97).

ARGUMENT

POINT I

The Court below ignored the provisions of Section 10 of the Administrative Procedure Act though its provisions were urged upon that Court. This Court has never construed Section 10 of that Act and the decisions of lower Federal courts thereon are in conflict.

An act to improve the administration of justice by prescribing fair administrative procedure (The Administrative Procedure Act) was approved on June 11, 1946, and became effective three months thereafter. The legislative history of the Act (Sen. Doc. No. 248, 79th Cong., 2d Sess.) presents convincing proof that the intent of the Congress in enacting that legislation was to reform administrative procedure, and the method of reform was more than procedural. It placed greater power and responsibility upon appellate courts in their review of action taken by administrative agencies.

The Act was the culmination of ten years of study. The Judiciary Committees of the Senate and of the House of Representatives held extensive hearings on the problems

involved, and the reports of those Committees on the Administrative Procedure Bill were painstakingly prepared. The definitions and explanations contained in such reports are especially worthy of consideration in construing and enforcing the Act.

Section 10 of the Act which deals with judicial review of administrative action received particular attention from both the House and Senate Judiciary Committees and there was considerable debate on the floors of both Houses concerning its meaning and effect. The heart of subsection (e), which establishes the scope of judicial review, is to be found in the provision that the reviewing court shall set aside any agency action which is unsupported by substantial evidence.

The rule that the findings of administrative agencies must be set aside unless supported by substantial evidence is not a new one. The rule of substantial evidence is of fundamental importance, since it is the dividing line between law and arbitrary power.[1] The difficulty which the enactment of the substantial evidence rule in the Administrative Procedure Act was designed to correct lay in the practice of some administrative agencies and some courts to rely, in arriving at their decisions, on something less than substantial evidence. The report of the House Judiciary Committee recognized that difficulty in the following language (Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 278-80):

> " 'Substantial evidence' means evidence which on the whole record is clearly substantial, plainly sufficient to support a finding or conclusion under the requirements of section 7(c), and material to the issues. It is exceedingly important. Difficulty has

[1] *E. g.*, see *National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. (2d) 13, 15 (C. C. A. 6th, 1938).

> come about by the practice of agencies and courts to rely upon something less—suspicion, surmise, implications, or plainly incredible evidence. Although the agency must do so in the first instance, under this bill it will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment whether on the whole of the proofs brought to their attention the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action or inaction. In reviewing a case under this fifth category the court must base its judgment upon its *own* review of the *entire record* or so much thereof as may be cited by any party."
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> * * * * * * * * *
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> "The requirement of review upon 'the whole record' means that courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case. * * *" (Emphasis supplied.)

In presenting the Administrative Procedure Bill to the House of Representatives, Congressman Walter, Chairman of the subcommittee of the House Judiciary Committee in charge of the Bill, said (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 370):

> "'The term "substantial evidence" as used in this bill means evidence which on the whole record as reviewed by the court and in exercise of the independent judgment of the reviewing court is material to the issues, clearly substantial, and plainly sufficient to support a finding or conclusion affirmative or negative in form under the requirement of section 7 (c) heretofore discussed. Under this section the function of the courts is not merely to search the record to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency acting by a scintilla or by mere hearsay, rumor, suspicion, speculation,

> and inference—cf. *Edison Co.* v. *Labor Board* (305 U. S. 197, 229-30). Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some "tenuous support of evidence"—*Bridges* v. *Wixon* (326 U. S. at 178). Nor may the bill be construed as permitting courts to accept the judgments of agencies upon unbelievable or incredible evidence.' "

It is clear that the Congress intended to place upon the courts the responsibility for insuring that administrative determinations of fact should be based upon probative and reliable evidence. The report of the Senate Judiciary Committee stated (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 216):

> " * * * It will be the duty of the courts to determine in the final analysis and in the exercise of their independent judgment, whether on the whole record the evidence in a given instance is sufficiently substantial to support a finding, conclusion, or other agency action as a matter of law. In the first instance, however, it will be the function of the agency to determine the sufficiency of the evidence upon which it acts—and the proper performance of its public duties will require it to undertake this inquiry in a careful and dispassionate manner. Should these objectives of the bill as worded fail, supplemental legislation will be required.
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> "The foregoing are by no means all the provisions which will require vigilant attention to assure their proper operation. Almost any provision of the bill, if wrongly interpreted or minimized, may present occasion for supplemental legislation. * * *
>
> " * * * Except in a few respects, this is not a measure conferring administrative powers but is one laying down definitions and stating limitations. These defi-

> nitions and limitations must, to be sure, be interpreted and applied by agencies affected by them in the first instance. But the enforcement of the bill, by the independent judicial interpretation and application of its terms, is a function which is clearly conferred upon the courts in the final analysis.
>
> "It will thus be the duty of reviewing courts to prevent avoidance of the requirements of the bill by any manner or form of indirection, and to determine the meaning of the words and phrases used. * * *"

It is to be expected when a new law is passed that covers a technical field hitherto untouched by legislation, that there may be confusion and uncertainty as to its interpretation and enforcement. Therefore, while it is surprising that the Court below ignored the Administrative Procedure Act in deciding the instant case, it is not surprising or unforeseen that the Act requires interpretation by this Court. Indeed, illustrative of the necessity for such interpretation, a conflict now exists between two lower Federal courts with respect to the meaning of a portion of Section 10 of the Act. In *Olin Industries, Inc.* v. *National Labor Relations Board,* 72 F. Supp. 225, 228 (D. Mass., 1947), the Court said:

> "Both the terms of this section (Section 10 of the Administrative Procedure Act), and its legislative history, make it clear that section 10 is merely declaratory of the existing law of judicial review and that it neither confers jurisdiction on this court above and beyond that which it already has, nor grants to aggrieved parties any rights they did not have under the National Labor Relations Act."

On the other hand, in *Snyder* v. *Buck,* 75 F. Supp. 902, 908 (D. D. C., 1948), a contrary view is taken:

> "The Court is not unmindful of the fact that some statements have been made to the effect that Section

> 10 is merely declaratory of existing law of judicial review, and does not confer jurisdiction on the courts beyond that which they already had, e. g., Olin Industries v. National Labor Relations Board, D. C. Mass., 72 F. Supp. 225. While this Court has examined many of these statements, it is unable to agree with them. • • • "

The present case is of the sort that produced the Administrative Procedure Act. The Commission's attorneys failed to prove their charge of a conspiracy to fix uniform prices for book paper. When their case was in, what emerged was the pattern of a highly competitive industry, in which uniform methods of quoting prices to merchants were employed—and necessarily had to be employed in dealing with a class of well-informed competing buyers—in order for potential buyers readily to compare the prices of competing sellers; in which list prices were responsive to demand and moved in direct relationship with general business conditions, the levels of production, and the movements of prices in other industries of low concentration and keen competition; in which actual spot prices varied from list prices for a large percentage of the business—the cutting of prices below list being so common and frequent that two paper merchants testified that, though list prices were usually identical throughout the industry, there were only two short periods (the start of the European war in 1939 and a "boiling market" in the spring of 1937) when they could not get a variety of price quotations from different mills (R. 1776, 1816); and in which the contract prices of each seller were kept secret from his competitors (R. 969), and varied, even as among customers of a single seller, according to the specifications of the paper ordered (R. 1158).

All the evidence that made out such a showing was ignored by the Commission. Instead, a different and quite

false picture of conditions in the industry was painted in the Commission's findings, by inferences based upon speculation, suspicion and surmise, and with the aid of bits of testimony, correspondence and excerpts from minutes and other papers, taken out of their context and presented in a false light.

Plainly, the interpretation and enforcement of the Administrative Procedure Act in accordance with the intent and purpose of the Congress rests squarely upon the Federal courts, and the proper discharge of the obligation of the courts in this respect is a matter of public importance. It is submitted that the present case presents to this Court an opportunity, not only to correct the injustice which has been done your petitioners in this proceeding, but also to interpret Section 10 of the Administrative Procedure Act in a way that will insure the future compliance of the courts with the legislative intent.

POINT II

The findings and order of the Commission are not supported by substantial evidence.

1. ***The Finding with respect to Uniformity of Prices.*** The Commission found, as petitioners proved and the Court recognized (168 F. (2d) at 603, R. 2280), that 55% of all book paper is sold through negotiated contracts, and that the remaining 45% is sold in spot transactions (R. 2218). The same exhibit (Res. Ex. 61, R. 1867) [1] from

[1] Many exhibits were not printed but were submitted to the Court below on stipulation. They are also submitted to this Court on stipulation (R. 2300).

which those percentages are drawn discloses that spot sales to merchants account for not more than approximately 28% of all book paper production.

The record does not contain a copy of any contract for the sale of book paper, and there is not any evidence whatsoever as to whether the contract prices of the several petitioners were uniform or quite different. Similarly, there is not any evidence whatsoever as to spot prices which the petitioners charged *to any class of purchasers other than merchants.* Nevertheless, the Commission found that the petitioners had "succeeded in maintaining price uniformity to a remarkable degree" for *all* book paper sold (R. 2239). The evidence upon which the Commission based that finding consisted of price lists and certain statistics of actual prices charged on spot sales to merchants of standard grades of book paper.

The price lists, issued by most of the manufacturing petitioners, announced quotations—usually uniform as among the petitioners [1] except when prices were changing—for standard grades of book paper to merchants in spot transactions. The price lists also announced quotations for special papers, as contrasted with standard grades, as to which there is no claim that the quotations shown on the various lists were uniform. They contained no quotations for sales on contract and no quotations for spot sales, even of standard grades, to purchasers other than merchants.

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[1] A fact ignored by the Commission and the Court below is that the list prices of manufacturers of book paper who were not members of the Book Paper Manufacturers Association, and who were not charged with a price-fixing conspiracy, were usually the same as the list prices of the petitioners (R. 1825).

The price lists were nothing more than price quotations at which manufacturers of book paper would (subject to change without notice) make spot sales to a certain class of customers. As to the standard grades of paper shown on said price lists, we need not labor in this Court the economic reason which—except during times of changes in price—would inevitably lead to uniform quotations of price. The evidence is undisputed that merchants bought from several manufacturers their requirements of the same grades of book paper. Obviously there was no reason why they should pay one manufacturer more for a certain grade than the price at which another manufacturer was offering to sell that grade; and just as obviously, where one manufacturer made a general reduction of published prices for various grades of paper, his competitors would have to meet those prices, and price quotations would again become uniform.

Despite the fact that petitioners' price lists contained only price quotations for a single class of purchasers (merchants) in a single type of transaction (spot sales), the Commission in framing its complaint charged petitioners with an agreement to fix and maintain uniform prices at which *all* book papers were sold to *all* classes of purchasers.

In charging the petitioners with an agreement to fix and maintain uniform prices for *all* book papers, the Commission may have been influenced by the fact that in other industries, subject to recent review by the courts, price lists represented the prices at which the commodities of those industries were actually sold in all instances, or with inconsequential exceptions. Uniform price lists, in those cases, meant uniform prices actually charged, with, at the most, inconsequential variations. That was true in the

Maltsters case;[1] it was true in the *Fort Howard Paper Company* case;[2] it was true in the *Rigid Steel Conduit* case;[3] it was true in the *Milk and Ice Cream Can* case;[4] and it was true in the *Cement* case[5] with minor exceptions, as this Court found. The common use of the basing-point practice by the Cement industry resulted, as this Court found, in absolute identity of delivered prices at any given point, which absolute identity was maintained, with rare exceptions, for long periods of time.

The evidence in this case conclusively establishes there was no such uniformity of prices actually charged for any book papers at any time.

Nevertheless, the Commission, in order to arrive at its finding of "uniformity to a remarkable degree" and the Court below, in order to arrive at its conclusion that prices were substantially uniform (168 F. (2d) 607, R. 2286), relied upon statistics as to prices charged by petitioners in spot sales to merchants during two one-week periods selected by the Commission. The statistical evidence relied on was set forth in the opinion of the Court of Appeals as follows 168 F. (2d) at 606-07, R. 2286:

> "There was evidence of the prices for spot sales to merchants for two different periods, one the week ending April 3, 1937, and the other the week ending July 16, 1938. Invoices were studied, analyzed, and tabulated in various ways, and they showed that in the 1937 period 85.62% of sales were in agreement

[1] *United States Maltsters Assoc.* v. *Federal Trade Commission*, 152 F. (2d) 161 (C. C. A. 7th, 1945).

[2] *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. (2d) 899 (C. C. A. 7th, 1946).

[3] *Triangle Conduit & Cable Co.* v. *Federal Trade Commission*, 168 F. (2d) 175 (C. C. A. 7th, 1948).

[4] *Milk and Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. (2d) 478 (C. C. A. 7th, 1946).

[5] *Federal Trade Commission* v. *Cement Institute, et al.*, 333 U. S. 683 (1948).

with the uniform price list; these sales represented 72.40% of tonnage and 75.63% of dollar value. For the 1938 period, 86.14% were in agreement with the uniform price list; these sales represented 77.64% of the tonnage and 79.56% of the dollar value."

We emphasize that the above analysis was based upon invoices of sales of *standard grades* of book paper consisting of less than 28% of the total sales of all book paper.

The significant percentages in the above-quoted excerpt from the Court's opinion are the percentages with respect to the tonnage of book paper, revealing, as they do, that in one week 28% of the tonnage was sold off list, and in the other week 23% of the tonnage was sold off list. Those percentages, *in terms of tonnage*, were not inconsequential but substantial. In the 1937 period over one ton in four was sold at prices which differed from the price lists and the dollar value of such sales was slightly over 24% of the total dollar value of all sales; in the 1938 period over one ton in five was sold at prices which differed from the price lists, and the dollar value thereof was over 20% of the total.

Every transaction between buyer and seller is not a matter of price bargaining. In the case of many sales transactions, time of delivery and prompt servicing of small orders by the seller—not price—are of paramount importance to the buyer. The amount involved in many other transactions is so small that neither the buyer nor the seller can afford to spend time and effort in dickering.

The seller of a homogeneous product naturally expects to receive as favorable a price as his competitor, and there must be some incentive—such as volume, delivery dates favorable to the seller, or the opportunity to add a new customer—to induce the seller to shade his price in a particular transaction. It is inevitable that in a normal free market, general price quotations for a homogeneous product will be at

the same price level, and that a substantial tonnage of the product will move at that level.

That is precisely what was found by the Temporary National Economic Committee and stated in its Monograph No. 1, "Price Behavior and Business Policy". There it was said (p. 6) that where products are standardized, "no individual seller can, for an appreciable period, charge a significantly higher price for his product than is being quoted by his rivals"; and (p. 33) that, in a competitive market with standardized products, "appreciable price differences between rival sellers in the same market cannot long exist". Aud further (also p. 33):

> "This applies with particular force to nominal or published price quotations. Secret rebates or concessions may be overlooked; but any open price cut made by one seller is almost inevitably met by his competitors in short order."

In the light of the foregoing, we turn again to the Commission's complaint. It charged that petitioners agreed to fix and maintain uniform prices for book papers, and concluded in its findings that there had been uniformity of prices "to a remarkable degree". The Court in its opinion went further than the Commission and found that prices were in "substantial uniformity" (168 F. (2d) 600, 607, R. 2286).

There was no direct evidence of agreement to fix and maintain uniform prices, and any such agreement could therefore be established, if at all, only by inference.

If the Commission could have shown that prices charged in actual sales of book paper—not list prices—were substantially uniform, that fact would have been some evi-

dence from which it might have inferred that a free competitive market was not functioning. See *Cement* case, 333 U. S. at pp. 715-16. Uniformity of prices would not, however, be conclusive evidence of agreement. There are economic factors which lead to uniformity of price in the absence of agreement. For example, in the book paper industry, there was a time in the post war period—and it is a matter of general knowledge—when the demand for book papers so far exceeded the supply that, to the buyer, price was a wholly secondary consideration, as distinguished from the ability to obtain delivery of paper. If prices were to vary under such conditions, it would be only because the buyer was willing to pay a premium over the general price quotation. Thus it appears that in any given case, an inference of unlawful agreement based merely upon substantial uniformity of prices would vanish in the light of evidence that such uniformity is in fact the result of economic forces in a competitive market. *But, in this case, there is not even any proof of substantial uniformity of prices.*

What are substantially uniform prices? They are, as a matter of law, prices which are "practically identical," or "identical with rare exceptions." *Ft. Howard Paper Co.* v. *Federal Trade Commission*, 156 F. (2d) 899, 907; *Cement Case*, 333 U. S. 683, 713, 719. Those are the terms which have been used interchangeably to describe the price uniformity found to prevail in those cases.

Accordingly, a degree of price uniformity less than complete uniformity with rare exceptions cannot be the basis for an inference that prices were fixed by agreement. Of course, an agreement to fix and maintain uniform prices having been charged, it would have been material for the Commission to establish that after the inception of the alleged agreement, prices attained a much

higher degree of uniformity than before. It would also have been material for the Commission to show that a degree of uniformity existed which was wholly inconsistent with concurrent business conditions. The Commission, however, did not attempt to make any such showing in this case. Indeed, the overwhelming weight of the evidence is that substantial uniformity of prices did not exist.

From the TNEC findings referred to above (p. 24), it would be supposed that a widely scattered industry dealing in a standardized product, with a low degree of concentration in large units, would prove itself to be a highly competitive industry if uniform list prices existed alongside of frequent cutting of prices below list to meet competition. That is exactly the pattern which the record shows to have existed in the book paper industry. Practically every industry witness called by the Commission testified that he sold at off list prices whenever he had to do so in order to get business; and the paper merchants who were called as witnesses testified that—except during two short intervals of "boiling" sellers' markets which existed during the complaint period, they were invariably able to get the mills to compete against one another on price (R. 1776, 1816).

The evidence which the Commission relied on for a contrary finding was, as set forth above, that during the weeks of March 29-April 3, 1937, and July 11-16, 1938, about 85% of all sales were at list prices, and such sales represented some 72% and 77% of dollar tonnage and some 75% and 79% of dollar value, of one class of sales, *viz*, the spot sales to paper merchants by 23 of the 45 manufacturing respondents.

The finding which the Commission based upon the above figures was that the respondents had "succeeded in main-

taining price uniformity to a remarkable degree" (R. 2239). The Commission gave no standard of what was "remarkable", nor did it cite any evidence of why the figures were remarkable. They covered only two weeks (selected by the Commission) out of the 4½-year period covered by the complaint. They covered only about half of the petitioners, and less than 28% of the business of that half.

In short, they constituted a very small sampling of the price structure of the industry during the complaint period; and, in order to arrive at a conclusion that was applicable to the petitioners generally and to the complaint period generally, the Commission had to make (whether or not it expressed) the finding that the sampling was fair and representative.

The record shows, however, that it was not fair and not representative. The 1937 week was, as the witnesses testified (R. 292-93, 361, 1287-88), a period of the briskest business and the keenest demand that the industry had experienced in recent years; and during the week immediately following there was a general and substantial rise in list prices (R. 762; Com. Ex. 763, R. 1575). Even a student of first-year economics would know that, at such a time, the prices of manufacturers to merchants would not be expected to vary substantially from list prices. They would not be expected, in fact, to show the substantial variations which the Commission found—with 28% of the tonnage and 24% of the dollar volume of business being done at prices below list.

The 1938 week selected by the Commission was equally unrepresentative. Business had been falling off since April, and at the end of June a drastic reduction of list prices ($10 to $20 per ton) had occurred, bringing list prices into conformity with a new low level which actual prices had

reached (R. 727-28). The Commission's selected week was the second week after that price reduction, and after a recovery of demand and an increase in the rate of production had commenced (Res. Ex. 76, R. 2032). Here again a college student of economics would perceive that, when prices had reached the bottom and business had commenced to recover, there would be a strong resistance to cutting prices further. It would not be expected that as much as 23% of the tonnage would be sold, and 20% of the dollar volume of business done, at below the new low level of list prices. Yet that is what the statistics showed.

Not only were the weeks selected by the Commission an unfair and unrepresentative sampling, but the prices for the 23 mills in those weeks, as we have indicated, did not show a "remarkable" degree of price uniformity. Even in the summary form in which the Commission presented the figures, they show a substantial amount of business done off list—28% of the tonnage in one week and 23% of the tonnage in the other. But when the figures are broken down and analyzed, as an "expert" tribunal would be expected to analyze them, the lack of uniformity of prices becomes more striking and points to the operation of strong competitive factors in the industry. The breakdown, in terms of sales at different prices, is as follows:

MARCH 29-APRIL 3, 1937

COATED ITEMS

(Res. Ex. 62)

Group *	No. of Sales	Highest Price	2nd Price	3rd Price	4th Price	All Other Prices
I	205	81 %	17.2%	.8%	1 %	
II	51	75.4%	22.9%	1.3%	.4%	
III	89	85.3%	4.7%	3.9%	.6%	5.5%
IV	242	54.7%	13.6%	9.6%	19.7%	2.4%
V	588	48.1%	37.8%	3.2%	1.7%	9.2%

UNCOATED ITEMS

(Res. Ex. 63)

I	231	84.7%	14.8%	.3%	.2%	
II	129	70.8%	29 %	.2%		
III	205	57.2%	24 %	10 %	4.3%	4.5%
IV	25	61.7%	38.3%			
V	309	31.4%	58.8%	6.9%	2.8%	.1%

JULY 11-16, 1938

COATED ITEMS

(Res. Ex. 64)

I	151	85.2%	7.9%	6.9%		
II	155	55.3%	21.3%	14.8%	4.1%	4.5%
III	98	43.1%	50.8%	6.1%		
IV	133	38.2%	26.3%	23.2%	3 %	9.3%
V	307	45.6%	.2%	48.8%	1 %	4.4%

UNCOATED ITEMS

(Res. Ex. 65)

I	227	66 %	33.2%	.8%		
II	117	68.2%	16.1%	7.3%	6 %	2.4%
III	103	79.5%	11.1%	5.1%	4.3%	
IV	184	46.5%	19.3%	33.5%	.7%	

* The items were grouped according to the tonnage sold during the week: Group I, less than 25,000 lbs.; Group II, 25,000-50,000 lbs.; Group III, 50,000-100,000 lbs.; Group IV, 100,000-250,000 lbs.; Group V, over 250,000 lbs.

It will be noted that the figures show a high proportion of sales in the low tonnage brackets at the highest prices (*i. e.*, list prices) and a considerably lower percentage in the higher tonnage brackets—reflecting the willingness of the buyer of small quantities to order at the list prices, as compared with the larger buyers' insistence on shopping around and getting the mills to bid against one another.

Certain of the figures are striking. In the case of uncoated items of paper in the highest quantity brackets—lots of 125 tons or more (Group V)—nearly 69% of the tonnage was sold below list price in the "boiling market" of April, 1937, while in the case of coated paper in the 1938 week, in spite of the low level of list prices, almost 55% of the business was done at still lower prices.

On the evidence recited, if it stood alone, the Commission's finding of a "remarkable" degree of price uniformity, and its conclusion that such uniformity must be explained by an agreement to fix prices, would have to be set aside as not supported by substantial evidence. Actually, however, it does not stand alone. It is buttressed by a great weight of evidence that requires an inference opposite to that drawn by the Commission.

There is, first, the testimony of the officers and employees of petitioners, and of the paper merchants who were called as witnesses, who explained how the business was conducted and showed that the industry was highly competitive, that sales off list prices were a common phenomenon and varied in frequency according to the level of demand, and that where uniformity in either list or actual prices was found in the industry, it was produced by the forces of competition which the TNEC had commented upon.

The Commission ignored all that evidence; and, though in doing so it must have disbelieved the testimony of some 40 witnesses (most of them its own witnesses, and some of them without any interest in the proceeding), we will assume that under recent decisions the Commission's determination to believe or disbelieve will not be passed upon by a reviewing court. But the Commission was not free, under any of the decisions, to select one piece of evidence (which in itself is a corroboration of the existence of a free market) and make it the basis of an inference flatly contrary to other evidence, when the latter portrayed facts that the Commission did not dispute. Yet that is what the Commission did; and the Court below refused to review its findings and decision in that respect.

The petitioners likewise introduced statistical evidence of prices which is consistent with, and a corroboration of, the existence of a free market. That evidence was the result of an extended study carried on by experienced statisticians over a period of eighteen months. The results were introduced in evidence as Exhibits 58, 68 and 69. We will not attempt a detailed description of these lengthy exhibits in this brief. However, an example of the prices existing in one of the three typical weeks included in the statistics of Exhibits 58, 68 and 69 follows:

There was not a single classification of paper, of which there were total sales of as many as 50 tons in that week, and of which there were as many as 4 transactions, for which there were fewer than 2 prices. There were as many as 20 different prices in 57 sales of a single classification of paper, and as many as 9 prices on 17 sales of another classification. Out of 10 standard classifications by grade and quantity, only 3 showed fewer than 5 prices in that week. In the case of uncoated paper in the largest quantity

lot, in which there were 251 sales, 97.3% of the business was done below list price. Even in the lowest quantity group for uncoated paper, where there were 220 sales, as much as 44.8% of the business was sold below the list price. In the intermediate quantity bracket (Group III), where there were 66 sales, only 4.9% of the business was done at list price.

The evidence for the other two specimen weeks is to the same general effect. Such evidence shows a "remarkable" lack of uniformity of prices.

The Commission has not contended that the three specimen weeks were not fair samples. However, although it had charged in the complaint a conspiracy to fix prices on all types of business—and has now persuaded the Court of Appeals that the conspiracy extended to prices on contract sales—the Commission objected (R. 1846, 1996) to the foregoing evidence on the ground that it included contract sales, as well as spot sales, and demanded that new studies be made, confined to spot prices (R. 1919).

Petitioners' statisticians, accordingly, took the foregoing data and broke it down for those mills (14 in number) whose invoices made it possible to distinguish between spot and contract sales. A detailed analysis of spot sales only was made and was presented as Respondent's Exhibit 66, 67 and 70. What those exhibits show is, in general, to the same effect as those shown by the larger studies. For every item of which more than 50 tons were sold during the particular weeks, there were always at least 2 prices, generally 4 to 6 prices, and sometimes as many as 8, 9 and 11 prices. As may be seen from Exhibit 70, there were substantial sales below list price for every item therein summarized, and in some instances only a small portion of the tonnage was sold at list prices.

Petitioners took the position before the Court of Appeals that the Commission was guilty of an error of law when it relied solely upon the evidence of the two unrepresentative weeks selected by it (*supra*, p. 27), and ignored the evidence of the three other, typical weeks. We took the further position that an analysis of the uncontradicted evidence even for the Commission's two selected weeks, disproved the Commission's conclusion that there was a high degree of uniformity of prices.

Further, it was our position that the Commission could not properly base the conclusion of price uniformity on evidence pertaining to so small a sampling for so short a period of time (two weeks out of 4½ years) without making a finding that those weeks were typical. It did not make, and could not make, such a finding.

In passing on the points thus raised the Court abdicated its judicial function. It said (168 F. (2d) at 606, R. 2286):

> "The remaining question is as to the sufficiency of the evidence to support the findings. The petitioners contend at the outset that there is no substantial evidence that prices were in fact in any substantial uniformity and therefore that the finding to that effect, supra, and according subsidiary findings must be set aside. We must also reject this contention. * * * "

Then, after setting forth the figures for price uniformity during the Commission's two specimen weeks, as quoted above, the Court went on (p. 607, R. 2286):

> "As we understand the petitioners, they do not deny the truth of this evidence, but seek to discredit it with arguments going to its weight and by pitting against it expert evidence of their own. Clearly, our appellate function does not involve the sort of review that the petitioners seek of this evidence."

That is not a correct statement of our position. Our argument is that Findings of Fact must be based upon all the relevant and material evidence, and that the Commission may not arbitrarily select a single piece of evidence and draw from it a conclusion that is flatly contradicted by other undisputed evidence. Indeed, the very evidence selected by the Commission contradicts the conclusion which it drew therefrom.

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There was no evidence of price abnormality during the complaint period. As has been noted above, the Commission found that petitioners "had succeeded in maintaining price uniformity to a remarkable degree". While the word "remarkable" as used by the Commission is without legal significance, it can only be supposed that its intended meaning is "abnormal". But the record does not contain any evidence that the degree of uniformity of prices in the book paper industry was abnormal.

There is not any evidence that book paper prices were more uniform than prices in other industries which are known to be competitive; neither is there any evidence that book paper prices were more uniform after the inception of the alleged agreement than they were prior to that time. In short, the record does not contain a standard by which it can be determined whether the degree of price uniformity that existed was "remarkable" or not.

Whether a degree of price uniformity is abnormal or not is dependent upon the economic conditions which prevail at any given time, or, in other words, upon the "dynamic quality of business facts underlying price structures". See *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150 at page 221.

Since the Commission made its finding of "uniformity to a remarkable degree" without reference to the business

conditions prevailing in the book paper industry during the two weekly periods chosen by it for its statistical study, and since it offered no standard for determining whether the degree of price uniformity found was abnormal, that finding should be set aside as arbitrary and capricious.

The scope of the issues in this case does not include contract prices or spot prices to purchasers other than merchants. The Commission inferred—and the Court below concurred—from a single statistical analysis of the invoices of spot sales to merchants of standard grades of book paper, constituting less than 28% of the total tonnage of book paper, that the remaining 72%, including tonnage sold on contract and in spot sales to others than merchants, was sold at uniform prices. There is not a scintilla of evidence in the record to show the prices for book paper that was sold on contract or in spot sales to others than merchants.

Counsel for the Commission did not argue before the Commission that contract prices for book paper were uniform, since there was no evidence as to prices in sales on contract. Commission's counsel then limited his contention to such prices as were charged to "customers who do not purchase their requirements on contract".[1] But before the Court of Appeals, despite the absence of any evidence as to what contract prices were, the Commission changed its position and argued that the issues included contract sales.

The Court accepted the argument of the Commission and specifically held that the issues were not limited to spot sales. In support of this conclusion, the Court, without any justification, pointed to "the uniform contracts prepared and distributed to the petitioners by the Association and the bids for Government business, which sales are contract sales". 168 F. (2d) 605 (R. 2284).

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[1] Brief before the Commission, p. 14.

There could not be any better illustration than its holding on this point that the Court below merely upheld the contentions of the Commission without making any independent determination of the issues based upon its own review of the whole record.

The uniform contracts referred to by the Court (Com. Ex. 51, R. 2084, 57) were merely *forms* of contract which some, but by no means all,[1] of the petitioners used in their businesses. The Association prepared and distributed the forms, but blanks were left for the names of the seller and the buyer, the price, quantity, size, weight, place of delivery, etc.

Equally far removed from reality is the acceptance by the Court of the Commission's argument that the issues included commercial contract sales of book paper because government "sales are contract sales". If the Court had reviewed the record, as it was bound to do under the law, it could not have made the statement that Government bids are in any way indicative of contract prices for book paper. True, sales to the Government are eventually made on contract with the Government Printing Office, but no one familiar with actualities in the book paper industry, which plainly appear from the record, would confuse those special government contracts with the ordinary contracts between sellers and private buyers.

2. *The Finding With Respect to Mason's Testimony.* Not only did the Commission infer an agreement on prices, based on the finding of price uniformity that is not supported by the record, but, as will hereinafter appear, it arrived at that conclusion in the face of uncontradicted evidence that compels the opposite inference.

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[1] R. 529, 570, 624, 1215-16, 1357.

In *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, 493, this Court stated the purpose of the Sherman Act as follows:

> "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury."

As this Court knows, the Commission in other cases has relied heavily upon economic evidence showing that free competition did not exist in a particular industry because prices did not respond to the normal economic influences that are found in a free market.

The conditions that influence prices in a free market are easily understood and commonly accepted. For example, in an industry that depends on mass purchasing power, it is elementary that prices will be high when the money income of the country is high, because demand will be high and production high. There will be a seller's market. On the other hand, such an industry is sensitive to "bad times". When demand begins to fall off and production is curtailed, sellers will cut prices to get business, will go further afield to get business, and will be more vigorous in their competition. Prices will therefore go down.

In order to ascertain whether prices in the book paper industry did or did not respond to the normal economic factors in a free market, respondents requested Professor Edward S. Mason of Harvard University, an economist of the highest standing, to make a study of such prices as reported by the Bureau of Labor Statistics and to analyze

them. Professor Mason appeared as a witness and presented his study, which he embodied in a variety of charts.

First, he compared book paper prices with production levels in the book paper industry. He showed that when the volume of production was high, prices went up, and that when the volume of production fell off, prices went down. He concluded that in those respects the industry had exhibited price competition during the complaint period (Res. Ex. 76; R. 2032-35).

Next, Professor Mason compared the movement of book paper prices with general price indexes prepared by the Bureau of Labor Statistics for all commodities, for semi-manufactured goods and for finished goods. His conclusion was that book paper prices had moved in accordance with the general price trends evidenced by the indexes (R. 2036-38).

Mason then proceeded to make a comparison of book paper prices with prices in several industries known to be highly competitive and in which there is little concentration of sales or output in the hands of a few large companies[1]—namely, boots and shoes, dress goods, woolens and worsteds, leather and lumber (Res. Exs. 78A, B, C, D; R. 2039-41). Similarly, he compared book paper prices with prices in certain other industries in which there are relatively small numbers of companies and in which the four or five largest companies produce a very high percentage of the total output of the industry—namely, tires and tubes, and iron and steel (Res. Exs. 78F, G; R. 2041-42). His conclusion was that the behavior of book paper prices

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[1] In the book paper industry, as both the Commission and the Court below found, no single petitioner produces more than 10% of the industry's output (R. 2227; 168 F. (2d) at 603; R. 2279).

was very similar to price movements in the industries which were known to be competitive, and did not correspond to prices in those industries where production and sales were concentrated in a very few units.

Furthermore, Mason explained that the volume of sales of book paper is not responsive to changes in price, but is very responsive to the public demand for articles which are made from book paper, such as books, magazines and labels that are used on cans. The price of paper is not influential in determining the volume of production of those articles because the cost of paper represents only a relatively small portion of the cost of a book, a magazine or canned goods. The factor which determines the volume of their production is public demand; in years of high national income, the demand is high, but in years of low national income, the demand falls off.

It is significant, therefore, that Mason found the volume of book paper production and book paper prices to be high in years when the national income was high, and low in the years when the national income was low (Res. Exs. 79, 80, 81; R. 2042-53).

Thus, in several ways, Mason demonstrated that book paper prices behaved as prices are expected to behave in a competitive economy. The Commission did not put on any expert witness, nor did it attempt in any way to refute Professor Mason's factual testimony. Nevertheless, without even discussing that testimony, it swept it aside in its entirety in the following extraordinary finding (R. 2245-46):

> "The Commission has examined and considered this opinion testimony. In the circumstances [unspecified] present in this case, including the existence of facts [unspecified] which affect the hypothesis

> [unspecified] upon which certain of the testimony [unspecified] is based as well as the existence of different and conflicting facts [unspecified] *shown by the record generally,* the Commission views the *opinion* testimony as entirely failing to support any contention that the price behavior of book paper has been due to operation of competitive forces without the intervention of respondents." (Italics supplied.)

If an arbitrary and capricious finding like this be permitted to stand, the Administrative Procedure Act will have been enacted in vain.

3. *The Subsidiary Findings with respect to Prices.* The Commission found that use by petitioners of Trade Customs, a zoning system of prices, and standard quantity and grade differentials reduced the question of price uniformity to the single element of base price (R. 2227). The Commission charged that each of these matters was the subject of agreement among the petitioners. There was not any direct evidence of any such agreement, and an enormous amount of evidence to the contrary. Nevertheless, the Commission made its inferences and its findings in accordance with its preconceived theory of the case.

(a) *Trade Customs.* As the Commission recognized, because of the many sizes, weights, finishes, trims, colors, quantities, packages, etc. in which paper may be sold, variations from some designated standard unit in those and other respects have for a long period of years been the sources of differences in price (R. 2219). Industry standards with respect to size, weight, etc., have come to be known as Trade Customs.

In September, 1933, during the NRA period, the Trade Customs of the book paper industry were compiled by a committee of the Book Paper Manufacturers Association

(Com. Ex. 46, R. 52), and distributed to all manufacturers and merchants in the industry (R. 50-1). In December, 1933, a similar compilation of Offset Trade Customs (which had to do with paper used for offset printing) was prepared (Com. Ex. 48, R. 52). On May 1, 1936, the Association issued a revised pamphlet, consolidating the two previous booklets, recognizing minor changes that had occurred since 1933, and supplying a convenient index and some illustrations of the application of particular provisions (Com. Ex. 47, R. 52).

Although the Commission appeared to recognize the necessity for having trade customs in the Book Paper industry, it charged and found, in substance, that (a) there was discussion and agreement at the time the Trade Customs were compiled by the Association during NRA; and (b) changes were made—again involving agreement—when the revised booklet of 1936 was put out (R. 2219-21).

With respect to the 1933 publication of Trade Customs, the evidence of all witnesses who testified on the subject was to the effect that it was a compilation of practices that then existed in the industry, and nothing more than that.[1] The Commission disregarded all of that testimony, and although there was not any testimony to the contrary, found as follows:

> "It is clear, however, that the first publication involved discussion, reconciliation of existing variations and differences, and agreement among members upon a standard set of 'trade customs' " (R. 2220).

Nowhere in the record is there even a suggestion that anybody thought that the changes reflected in the 1936 booklet were "substantial". That idea appeared first in

[1] R. 50, 97, 114, 484-5, 505, 586, 613-14, 640, 667, 737-38, 804, 829, 871-72, 926, 940-41, 1023, 1070, 1201-02, 1256, 1327, 1343, 1374, 1375-76, 1394, 1442-43, 1518, 1523-24, 1531-32.

the findings of the Commission where it is stated that "a comparison of the 1936 publication * * * with the 1933 publications shows substantial differences between them * * *" (R. 2220). But a comparison of the 1933 booklets with the 1936 booklet (all of which are in evidence) will disclose that there are not any substantial differences. As counsel for the Commission admitted in their brief before the Commission (p. 37), the 1936 publication was "simply a reprint of the material contained in Commission's Exhibit 46 [the 1933 booklet], but much more completely indexed and containing in addition, the trade customs applying to offset paper which had not been included in the first volume".

Nevertheless, the Court in its opinion (168 F. (2d) at p. 608, R. 2288) said:

> " * * * The Commission found further that these trade customs were revised and expanded by means of agreement in 1936, after the N. R. A. period, and that they have been and are in general use. To support this finding, without going into detail, are the minutes of the Association and the testimony of witnesses, manifestly capable of supporting a finding of collusion and agreement."

Thus, the Court disregarded all the testimony, the Trade Customs booklets themselves (which are the best evidence of the fact that there were not any substantial differences between the 1933 compilations and the 1936 compilation) and the admission of counsel for the Commission that the 1936 publication was "simply a reprint" of the 1933 publications. As for the minutes of the Association—except for a single request by the Executive Committee that one of the customs be interpreted by the Trade Customs Committee (Com. Ex. 89, R. 2098-108), it does not appear that Trade Customs were even discussed at Association meetings. It does not appear that the requested interpretation was ever

given; and it certainly has no relevance to the question of whether, at a prior date, the Trade Customs had been changed by agreement.

The Court's statement about Trade Customs is not supported by substantial evidence.

(b) *Zoning.* The Commission made the following Findings (R. 2222-23):

> "* * * In 1933, the association adopted, as a part of its recommendations to NRA for inclusion in the Code for the Book Paper Division, a zoning system originated by the Champion Paper and Fibre Company. This adoption necessarily involved discussion of and agreement upon the territorial areas to be included in each zone and the price differentials to be made applicable in each, and copies of the zone plan as adopted were furnished to the individual manufacturers by the association. * * *
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> * * * * * * * * * *
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> "No change was made in this system upon the dissolution of NRA. Respondents have continued to use it in the same way in which it was used under NRA and it is now in general use by them. * * * In his testimony, an officer of one of the corporate respondents explained its continued use as being by mutual consent because it is a convenient method of handling the freight situation. The system was in fact continued by mutual understanding and consent."

There is no dispute about the fact that Champion instituted its zoning method of pricing for its own business reasons and then unilaterally put that method into effect in April, 1933, before the NRA was passed (R. 2222). Nor was Champion the first company to sell at delivered prices. One company had been selling at delivered prices since 1902 (R. 351). Not only were delivered prices common in

the industry, but some of Champion's principal competitors had been selling for a long time on a zone basis, involving freight differentials outside the eastern part of the United States.

Thus the action of Champion in 1933, when it adopted a zoning method, did not introduce into the industry a new and abnormal practice, but followed the general method of selling that some of its most important competitors had previously adopted. The record is barren of testimony that even suggests that there was anything abnormal in the evolution and adoption of Champion's zoning method. It affirmatively shows that Champion's method was a normal evolution from the development of national brand-line papers (R. 650, 1243); that it did not differ radically from other zoning methods widely employed in the industry; and that most of its competitors adopted it either because they liked it, because it completely eliminated freight rate computations, or because they were forced by competition to extend to their customers certain advantages which were afforded by the Champion method (R. 454, 490).

The Commission did not pay any attention to this unchallenged evidence, but based its findings upon surmise, speculation, and, in at least one instance, on plainly incredible evidence. Thus, the finding that the zoning system was continued after the NRA period by "mutual consent" is purportedly based upon the words of an officer of one of the petitioners while testifying in this case (R. 1524-25). To even a casual reader of his testimony, it would be obvious that the Commission took those words out of context and ignored the witness's explanation of his meaning during his cross examination (R. 1532-33) in order to find superficial support for the theory which it was determined to prove. A similar disregard by an administrative agency of the

explanation of testimony upon cross examination received judicial condemnation in *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 177 (C. C. A. 9th, 1938), as follows:

> "The Board vaguely sanctioned certain statements of evidence by mingling them with its findings, without noting, as we have pointed out, that this evidence had been changed or modified upon cross examination, or shown to be incorrect by other admitted or established facts. From a careful consideration of all the evidence the Court is satisfied that there is no substantial basis for the finding * * *."

But the Court below gave its approval to the Commission's "mutual consent" finding in the following language (168 F. (2d) 608, R. 2288):

> "The Commission further found that the zoning system was continued after the N. R. A. by mutual understanding and consent, and that despite minor variations it is in general use. This finding is based in part upon the minutes of the Association and also on the testimony of a witness to the effect that it had been continued by mutual consent. 'We think the artificiality and arbitrariness of the zone structure is so apparent it cannot withstand the inference of agreement.' *Fort Howard Paper Co. et al.* v. *F. T. C.*, *supra*, at page 907.'"

The reference by the Court to the minutes of the Association as evidencing a continuation of the use of the zoning system by "mutual consent" is not supported by the minutes themselves in any way.

In another part of its opinion, in an apparent effort to bolster its conclusion that "we cannot say the Commission's inference are unreasonable", the Court had the following

to say about the zoning method of pricing (168 F. (2d) at 607, R. 2287):

> "• • • The petitioners did with varying uniformity use the zoning system of price quoting, and the existence of this plan which equalizes delivered prices of competititors having widely different costs at a given destination, is strong evidence in itself of an agreement to use such plan. Triangle Conduit & Cable Co., Inc., et al. v. Federal Trade Commission, supra; Fort Howard Paper Co. et al. v. Federal Trade Commission, supra, 156 F. 2d at page 907. Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the others' acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy, William Goldman Theatres, Inc. v. Loew's, Inc., et al., 3 Cir., 150 F. 2d 738, 745."

Thus the Court disposed of the facts (which are of the utmost importance) that the zoning method of pricing was nothing more than a trade practice generally employed in quoting prices to merchants, which none of the petitioners used except when it wanted to (R. 444, 504, 876-77, 939-40, 1091-92, 1425, 1443), that some of them did not use it at all (R. 571, 710, 827, 842-43, 1160, 1335), and that most of them did not use it on contract business but only in quoting spot prices to merchants.

A twisted interpretation of the *Goldman* case, cited by the Court below in the above quotation, is required if any application of the proposition for which it is cited is to be given to the facts of the instant case. There it was found that the defendants controlled the production and distribution of more than 80% of the feature motion pictures in the United States, and that no exhibitor could successfully operate without exhibiting defendants' pictures. The Court found that each distributor defendant knew that its refusal

to lease pictures to plaintiff, together with a similar refusal on the part of all other distributors, would lead to an illegal monopoly. The uniform refusal of the defendants to lease to plaintiff, with the knowledge that it would lead to monopoly, was the "uniform participation by competitors in a particular system of doing business" that the Court condemned. But that situation is nothing like the situation in this case where the Commission attacked nothing more than the general use by the petitioners of a method of pricing.

Furthermore, it is submitted that this Court should reject the doctrine enunciated by the Court below that the use by each of the petitioners of a zoning method of pricing, with the knowledge that other petitioners are also using it, is sufficient to establish an unlawful conspiracy. The acceptance of that doctrine would lead to chaos in the business world; it is impossible to see what advantage might result to justify its effect.

Let us consider what the effect would be. Manufacturer A (such as Champion in the instant case) independently inaugurates a method of price quotation which in and of itself has no taint of illegality. Manufacturers B, C, D, E and F, constituting all of its competitors, without request, persuasion or coercion by Manufacturer A, and without any agreement among themselves, adopt A's method of pricing. Manufacturer A would have no means of preventing its competitors from taking such action, but as soon as they had, it would find itself, according to the Court below, engaged in an illegal conspiracy.

The doctrine that uniform participation in a method of pricing is sufficient to establish conspiracy has never been adopted by this Court or any other court except the Court below. See *Triangle Conduit & Cable Co., Inc., et al.* v. *Federal Trade Commission*, 168 F. (2d) 175.

It is of the greatest importance to industry that this Court disavow that doctrine and remove the threat inherent therein that a seller, without any fault on his part, may be found guilty of conspiracy.

(c) *Quantity and Grade Differentials.* There is very little evidence in the record about quantity and grade differentials except the bare fact that they exist. That is, it is customary for book paper manufacturers to sell their products in quantities of 1 case, 4 cases, 5,000 lbs., 10,000 lbs. or by the carload—and there is a difference in price depending upon the quantity ordered. Similarly, the 5 grades of coated paper and the 5 grades of uncoated paper have become reasonably well standardized; each better grade carries a higher price than the grade below it, and the differences in price between one grade and the next are known as grade differentials. Frequently, grade and quantity differentials as among the various petitioners (and among all other sellers of book paper as well) are the same. With respect to quantity differentials, the Commission found:

> "The record does not show when the precise quantity differentials appearing in respondents' price lists * * * were established. * * * From these actions and other related facts in the record [referring to Com. Exs. 95 and 98, which are obscure and hopelessly unintelligble documents] and from the identity of the quantity differentials actually used by respondents in their price lists, the commission infers and concludes that they were established in the same manner; that is, as a result of cooperation and understanding among respondents" (R. 2226).

With respect to grade differentials, the Commission found as follows:

> "The vagueness of the minutes and lack of other evidence result in no specific showing having been made as to the exact origin of these differentials in

price between grades, or how the changes in them were made. It is apparent, however, that they are in common use and that the changes, when made, were general. The quotations from Commission Exhibit 98-B, C and D * * * because of the references to price differentials as between types of paper, strongly suggest that the price differentials as between grades are the result of cooperative action by respondents" (R. 2226-27).

The language of those findings indicates that the Commission itself recognized the lack of any evidence to support the accusations thus incorporated in its Findings of Fact. Although the reviewing Court did not mention grade differentials in its opinion, it asserted (at 168 F. (2d) 608, R. 2289) that "petitioners are proved to have agreed upon * * * uniform quantity discounts". Here again the Court gave its approval to findings based on nothing more than surmise and suspicion.

4. *The Finding with respect to Government Bids.* The Commission found (R. 2245) that the petitioners had "understandings and agreements" concerning prices to the Government Printing Office (GPO).

The Government business of the book-paper industry is a class of business entirely separate and apart from its commercial business, as the Commission recognized both in its complaint (R. 10) and in its findings of fact (R. 2239-2245). The GPO solicits sealed bids for its estimated requirements for each six-months' period, and its business is awarded to the low bidder by the Congressional Joint Committee on Printing. Even upon the Commission's theory of the case the evidence relating to Government business was entirely without probative value as to all business in the commercial field.

In considering the Commission's finding with respect to Government bids, the Court below simply accepted certain

evidence relied upon by the Commission as conclusive, and failed to consider all the evidence concerning Government business in order to ascertain whether on the whole record the Commission's evidence was substantial. The Court said:

> "The Commission found that there was uniform though sealed bidding to the United States Government Printing Office, and that this was the result of agreement. This finding is buttressed by correspondence, the testimony of petitioner Allied's merchant-agent whose price cutting resulted in the petitioners' refusal to fill the order he had obtained, and the testimony of the Director of Purchases of the Government Printing Office." (168 F. (2d) at p. 608, R. 2288.)

It might be assumed from those statements that the uniform bidding for Government business continued throughout the complaint period. That was not so. All uniformity on Government bids had completely disappeared for a substantial period prior to the issuance of the complaint.[1]

During the NRA period bids on Government business were uniform, as they had to be. The manufacturers were prohibited from bidding on any lower basis than their filed prices (Code of Fair Competition for the Book Paper Division of the Paper and Pulp Industry,[2] Art. VII, Section 5). Since the Government was required to accept the lowest bid, and since every mill knew in advance what the lowest filed price was, and was entitled to meet that price, it is obvious that if any mill wanted Government business it had to bid as low as the lowest filed price of any other mill. E. E. Emerson, Director of Purchases for the GPO testified that the bids "had to be the same or they were thrown out" (R. 1543).

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[1] Com. Ex. 746, R. 1538; Com. Ex. 760, R. 1569.
[2] Codes of Fair Competition, Vol. III, p. 136.

For the period that uniform bidding on Government business continued after NRA, the prices actually quoted the Government were the list prices to merchants on spot sales less 3%. That was the practice which had prevailed under the Code (R. 1126), and it apparently met with the approbation of the Government. The Joint Committee on Printing continued to allocate the GPO business to the respective mills, as it had done during NRA, upon the basis of the tonnage that each had received in the years prior to NRA. The advantage to the GPO of that method of doing business, as Mr. Emerson testified, was that the GPO could get its paper from mills that were experienced in handling its requirements, with the assurance that it would get just what it wanted (R. 1543-44). Somewhat later the Joint Committee, influenced by "kicks" from bidders who were not getting any business, changed to a method of awarding GPO contracts by lot, but that method proved entirely impracticable (R. 1544). It was not until 1938 that the Committee concluded that tie bids were undesirable and adopted a policy of rejecting all such bids (R. 1544-45).

The principal reason why manufacturers, acting individually and not in concert, continued to bid their list prices to the GPO is that the bids were made public (R. 844-45). Emerson testified as follows:

> "They [the bidders for Government business] may have lots of commercial business at a much higher price, and then if they should quote the Printing Office much lower, why, there would naturally be a howl" (R. 1543).

It was not until the Government adopted the policy of not disclosing the names of the mills which were successful in Governments bids that this substantial reason, which impelled the various manufacturers to bid their list prices, was eliminated. Disparity of bids followed immediately (R. 1545).

In summary, the testimony was to the effect that the mills interested in Government business had become accustomed, during the NRA period, to selling the GPO at the regular list prices that they charged other printers on comparable quantities; that the mills thought their regular prices to commercial printers were fair prices to the GPO for comparable quantities; and that after NRA they individually determined to continue bidding on that basis, knowing that the bids would be made public and would be available to their commercial customers (R. 844-45, 1126, 1174-76, 1194, 1543).

In order to arrive at a finding of conspiracy to fix uniform prices to the GPO, the Commission had to reject or ignore the testimony above recited and draw its inference of conspiracy from the mere fact of uniform bids (clearly an insufficient basis for such an inference, standing alone) and other evidence which it described as "the reaction of respondents to non-identical bids that were low, together with the other facts shown", *i. e.*, the Walsh episode (R. 2245). The "reaction" to non-identical bids is to be found in 3 letters (Com. Exs. 683, R. 1406; 769, R. 1578; 770, R. 1578) written by a *single* employee (Harrison) of a *single* petitioner (West Virginia), about GPO bidding in February and June, 1937.

The reviewing court accepted the inference of the Commission based upon the Harrison letters and the Walsh episode, and added that the Commission's finding of an agreement among the petitioners to quote uniform prices to the GPO was supported by Emerson's testimony. The reference to Emerson is inexplicable, for, as shown above, Emerson's testimony affords a complete explanation of why Government bids were uniform, and constitutes a complete refutation of the charge that such uniformity came about through agreement.

The letters relied upon by the Commission were written by Harrison, West Virginia's New York sales manager, to the merchant in Washington who bid on GPO business for West Virginia. Without going into detail, the letters simply requested information as to the name of the mill that had made the low bid on two items of Government business. There is not even a suggestion that, after finding out the name of the mill that made the low bid on one of the items (Com. Ex. 771, R. 1578), Harrison communicated with that mill, or took any other action. It is impossible to understand how those letters could be considered by the Commission, or anyone else, to be evidence of a conspiracy among the petitioners, none of whom except West Virginia is shown to have been acquainted with Harrison or to have had any knowledge of his correspondence.

The Walsh episode, around which a considerable portion of the record was built, was as follows:

Walsh, a paper merchant, was authorized by Allied Paper Mills to bid as its agent on certain lots in the Government proposals for the first half of 1938 (Com. Ex. 369, R. 793). After listing the prices for each item the letter of authorization continued: "The above prices are to be quoted to the Government. Unless this is complied with we will not accept the orders if you are successful in getting them."

As was usual, Allied had authorized other agents to bid on the same Government proposals and the same instructions were included in their letters of authorization (R. 1603-4). The inclusion of that provision was the result of an earlier experience of Allied, which one of its officials described as follows:

> "* * * in the second half of 1936, we had quoted several merchants on the Government Printing

> Office's requirements for the last half of 1936. We had failed to put in any instruction of this character, and one of the customers, Thomas Barrett, broke their commission one-half of one percent., and as a result, the Allied home office and the Eastern Division office was very much embarrassed because naturally the other merchants resented the fact that Barrett could cut the price, and in so doing, received about $225,000 worth of business" (R. 1603-4). [The letter authorizing Barrett to bid is Commission's Exhibit 366, R. 775.]

Contrary to the specific instructions in his authorization Walsh quoted 1 percent less than the price authorized by Allied. Allied in fairness to its other merchant agents refused to accept the order (R. 1605).

Walsh approached several other book paper manufacturers in an effort to obtain the paper with which to fill the Government's order. He testified that representatives of certain of the petitioners told him they would not furnish him the paper because he had cut the price. Each one of such representatives named by Walsh (except one who had died) was called as a witness, and each of them denied that he had ever told Walsh anything like that—and all of them stated perfectly justifiable reasons why they would not fill the order (*e. g.*, R. 1614, 1628, 1637, 1638, 1657, 1673). The Commission did not resolve the issues of fact between Walsh and the numerous witnesses who contradicted him; its finding was as follows (R. 2243):

> "Walsh testified that in some instances he was told by mills that they were not interested, in some cases that they would not fill the order because he cut the price. Though these latter statements were denied by the parties to whom they were attributed by Walsh, the fact is that Walsh was unable to place the orders with any other mill."

In that carefully worded finding the Commission avoided taking a position as to whether Walsh was telling the truth or not. Indeed, the extraordinary performance of Walsh as a witness affords ample reason for the use of circumspection in characterizing what he said (R. 1452-1508). He made many wild assertions in his testimony, contradicted many of them himself, and was contradicted as to others by numerous witnesses, including the entirely disinterested Mr. Emerson of the GPO. Since the Commission did not resolve the conflict in the testimony, and failed to make the only findings relating to the Walsh incident from which an inference of agreement on Government bids could be drawn, it is apparent that the Commission itself did not regard the Walsh episode as substantial evidence to support the charges which it made.

Even if an order were justified in respect of Government business it should have been limited to that type of business alone, for it is not disputed that the Government business was separate and apart from the commercial business in which petitioners were principally interested.

5. *Other Findings of the Commission.* Other evidence from which the Commission inferred conspiracy is recited in the opinion of the Court below as follows (168 F. (2d) at 607, R. 2287):

> "* * * The evidence here which supports the finding of combination and conspiracy is legion: all the petitioners expressly pledged their continued cooperation with the Association upon the termination of the N. R. A.; the petitioners continued to file price changes with the Association on forms provided by the Association therefor and these changes were disseminated by the Association; many petitioners mailed their new base prices directly to other petitioners; the Association prepared standard contract forms containing specified provisions relating to

> ultimate prices, and most of the petitioners used these forms with or without minor variations; and the Association held frequent and well attended meetings. The petitioners do not controvert the truth of this evidence, but address arguments to its weight and the inferences that should have been drawn therefrom. We cannot say that the Commission's inferences are unreasonable. * * * "

But an analysis of the foregoing reveals that the inferences of the Commission are without any foundation whatsoever. Thus:

(a) *"All the petitioners expressly pledged their continued cooperation with the Association upon the termination of the N. R. A."*—The termination of the NRA did not make trade associations unlawful. The evidence abundantly shows that there were numerous activities of the Association which were of importance to each of the petitioners—activities which no one ever suggested were conspiratorial or otherwise improper (R. 877, 1021, 1391-92).

(b) *"The petitioners continued to file price changes with the Association."*—This is one of the most unfair findings that the Commission made. In the first half of 1935, while the NRA was in effect and while petitioners were *required by law* to file their prices with the Association, there were 604 price filings. In the latter half of 1935, there were 157 price filings. There were 82 prices filings during all of 1936, 76 in 1937 and only 3 each in 1938 and the first half of 1939 (Com. Ex. 93, R. 111).

(c) *"Many petitioners mailed their new base prices directly to other petitioners."*—The undisputed evidence is that list prices in the book paper industry are public property (*e. g.*, R. 495, 655, 939,

1019-20). Because most of the merchants in the book paper industry purchase their stocks from a number of manufacturers, a change of price by any particular manufacturer is broadcast throughout the industry within a few hours after it is announced. So the mailing of price lists by one manufacturer to another, after they were already in effect, was a matter of courtesy, and had nothing to do with price-fixing.

(d) *"The Association prepared standard contract forms."*—This finding has already been discussed in a prior section of this brief (p. 36).

(e) *"The Association held frequent and well attended meetings."*—So do many other organizations.

The Court's conclusion after reciting the foregoing bits of "evidence" was that the Commission's inferences of the petitioners' guilt were not "unreasonable". The Court found it unnecessary to refer in this connection to Section 10 of the Administrative Procedure Act or to say that suspicion, surmise, implications, or plainly incredible evidence are not substantial evidence. But apart from the Administrative Procedure Act, the foregoing acts and activities considered singly or in their entirety constitute no basis on which to predicate an inference of guilt.

POINT III

The Court below in reviewing the order and findings of the Commission failed to apply the applicable provisions of the Administrative Procedure Act.

The opinion of the Court below discloses on its face that the Court reached its decision in this case without any reference to the Administrative Procedure Act. The Court did not mention the Act despite the fact that it discussed at

some length the limitations upon its jurisdiction to review. It announced with emphasis that there could not be any doubt of the limited character of its jurisdiction to review. 168 F. (2d) 605, R. 2283. It relied upon the general rules that findings are to be construed liberally, that reasonable inferences which *may be* based on facts found will be deemed drawn (p. 606, R. 2284), and that conspiracy can be shown by circumstantial evidence (p. 607, R. 2287).

Many of the Court's statements which it made in reaching conclusions favorable to the Commission reveal a lack of familiarity with the record which is not consonant with the duty of the Court under the Administrative Procedure Act to review the whole record or such portions of it as were cited by any party. An outstanding illustration of the Court's lack of familiarity with the record is afforded by its holding that the scope of the issues included contract prices as well as spot prices.

The record does not contain a copy of any contract for the sale of book paper nor any evidence of the prices charged on contract sales. (See *supra*, p. 35.)

Another illustration of the Court's lack of familiarity with the record appears in its approval of the finding of the Commission that the zoning method of pricing was continued by "mutual consent". That finding, as has been noted above (pp. 44-45) was based upon a palpable distortion of the truth, but the Court apparently did not review the record sufficiently to understand that such was the case.

The Court was not mindful of the admonition that under the Administrative Procedure Act "courts may not look only to the case presented by one party, since other evidence may weaken or even indisputably destroy that case".[1]

[1] Report of House Judiciary Committee, Sen. Doc. No. 248, 79th Cong. 2d Sess., p. 280.

It is clear from its opinion that the Court looked only to the evidence of the Commission, and ignored the evidence on behalf of petitioners. That is especially obvious in the case of the testimony of Professor Mason. The Court refused to acknowledge the uncontradicted *facts* presented by Mason and referred to the citation of those *facts* by petitioners as an attempt to "discredit" the evidence of the Commission "by pitting against it expert evidence of their own" (168 F. (2d) p. 607, R. 2286).

But the most striking aspect of the Court's failure to apply the provisions of the Administrative Procedure Act appears in its definition of "substantial evidence". This is a case where the Commission did not have any direct evidence of conspiracy, but relied entirely on inferences from the facts. Therefore, the Court below in effect deprived the petitioners of their right to judicial review when it held, on the controlling issue in this case, that where a piece of evidence is equally consistent with guilt or innocence, it is evidence of guilt if the Commission says it is. As we have demonstrated above (pp. 19-57) the Commission's inferences are untenable. Nevertheless, as a matter of law, the Court not only failed to apply the Administrative Procedure Act, but it relieved the Commission of its burden of proof. The Court's exact language is as follows (168 F. (2d) p. 605, R. 2283):

> "* * * If there is substantial evidence though it be conflicting, the findings cannot be disturbed. Fioret Sales Co., Inc., et al. v. Federal Trade Commission, 2 Cir., 100 F. 2d 358, 359. In view of this, we cannot sustain the petitioners' contention that where two contradictory and reasonable inferences may be drawn from the same evidence, the reasonable inference of guilt found by the Commission is not supported by substantial evidence. If the Commission's inference from the facts is reasonable, our inquiry ceases."

The first sentence of the foregoing excerpt from the Court's opinion is, of course, an accurate statement of the law, but the second sentence does not follow from the first, and is in direct conflict with decisions of this Court and with decisions of other Courts of Appeals.

We understand that where there is substantial evidence pointing to one conclusion, and substantial conflicting evidence pointing to another, it is for the triers of fact to weigh the evidence and reach a decision as to guilt or innocence; and the reviewing court will not reverse merely because it might have reached a different decision itself.

But the rule that we rely on is quite a different one. It is that where a piece of evidence is neutral—*i. e.*, equally consistent with guilt or innocence—the plaintiff or prosecuting party has not sustained its burden of proof and therefore cannot prevail.

The true rule, both with respect to "conflicting evidence" and with respect to "contradictory inferences" is stated in this Court's opinion in *Pennsylvania Railroad Company* v. *Chamberlain*, 288 U. S. 333, 338-39 as follows:

> "• • • It, of course, is true, generally, that where there is a direct conflict of testimony upon a matter of fact, the question must be left to the jury to determine, without regard to the number of witnesses upon either side. But here there really is no conflict in the testimony as to the *facts*. • • •
>
> "We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. [Citing cases.]

"The rule is succinctly stated in *Smith* v. *First National Bank in Westfield*, 99 Mass. 605, 611-612, quoted in the *Des Moines National Bank* case, *supra*:

" 'There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.' "

Although the *Pennsylvania Railroad* case is the leading case on this subject, the rule there stated has been given frequent application. *J. B. Lippincott Co.* v. *Federal Trade Commission*, 137 F. (2d) 490, 494 (C. C. A. 3d, 1943); *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985, 989 (C. C. A. 4th, 1938); *Texas Co.* v. *Hood*, 161 F. (2d) 618, 620 (C. C. A. 5th, 1947), cert. den. 332 U. S. 829 (1947); *United States* v. *Barry, et al.*, 67 F. (2d) 763, 765 (C. C. A. 6th, 1933), cert. den. 292 U. S. 648 (1934); *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480, 485-86 (C. C. A. 8th, 1941); *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 177 (C. C. A. 9th, 1938); *Koppers United Co.* v. *Securities & Exchange Commission*, 138 F. (2d) 577, 581 (App. D. C., 1943).

Third Circuit

" ' * * * Evidence which is entirely circumstantial and which equally supports either of two opposed or inconsistent inferences cannot of itself be deemed to

furnish substantial support for one of such inferences to the exclusion of the other. See Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333, 339, 53 S. Ct. 391, 77 L. Ed. 819, and cases there cited. * * * ' " *J. B. Lippincott Co.* v. *Federal Trade Commission*, 137 F. (2d) 490, 494.

Fourth Circuit

" * * * The rule as to substantiality is not different, we think, from that to be applied in reviewing the refusal to direct a verdict at law, where the lack of substantial evidence is the test of the right to a directed verdict. In either case, substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; *and the test is not satisfied by evidence* which merely creates a suspicion or which amounts to no more than a scintilla or *which gives equal support to inconsistent inferences.* Cf. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-343, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819. * * * " [Emphasis supplied.] *Appalachian Electric Power Co.* v. *National Labor Relations Board*, 93 F. (2d) 985, 989.

Fifth Circuit

" * * * The circumstances sought to be shown by Plaintiff, even if all were admitted to have been proven, are entirely consistent with the positive, uncontradicted, and unimpeached testimony of the three eye witnesses as to how the collision occurred. Where two equally justifiable inferences may be drawn from the facts proven, one for and the other against the Plaintiff, neither is proven, and the verdict must be against him who had the burden of proof. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819. * * * " *Texas Co.* v. *Hood*, 161 F. (2d) 618, 620, cert. den. 332 U. S. 829 (1947).

Sixth Circuit

"* * * it is only necessary to say that when proven facts support equally two inconsistent inferences, there is no substantial evidence to support either, and judgment must go against the party having the burden. * * *" *United States* v. *Barry, et al.*, 67 F. (2d) 763, 765, *cert. den.* 292 U. S. 648 (1934).

Eighth Circuit

"* * * At most the evidence gave support to either of two equally justifiable inconsistent inferences and hence proved neither. Pennsylvania Ry. Co. v. Chamberlain, 288 U. S. 333, 53 S. Ct. 391, 77 L. Ed. 819; Bussman Mfg. Co. v. N. L. R. B., 8 Cir., 111 F. 2d 783. As the burden of proof was upon the Board to prove its charges by a fair preponderance of the evidence (Cupples Co. Manufacturers v. N. L. R. B., 8 Cir., 106 F. 2d 100), this finding must fail for want of substantial evidence." *Texarkana Bus Co.* v. *National Labor Relations Board*, 119 F. (2d) 480, 485-86.

Ninth Circuit

"'* * * Substantial evidence is evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred; *and the test is not satisfied by evidence* which merely creates a suspicion or which amounts to no more than a scintilla or *which gives equal support to inconsistent inferences.* Cf. Pennsylvania R. Co. v. Chamberlain, 288 U. S. 333, 339-353, 53 S. Ct. 391, 393, 394, 77 L. Ed. 819.' Appalachian Electric Power Co. v. National Labor Relations Board, 4 Cir., 93 F. 2d 985, 989." *National Labor Relations Board* v. *Union Pacific Stages, Inc.*, 99 F. (2d) 153, 177. [Emphasis supplied.]

District of Columbia

"* * * the most that could be said in petitioners' favor would be that two equally probable, but incon-

> sistent, inferences could be drawn from the entire evidence. In such circumstances a finding against the party upon whom rests the necessity of sustaining one of these inferences is clearly correct. * * *" *Koppers United Co.* v. *Securities & Exchange Commission*, 138 F. (2d) 577, 581.

It is respectfully submitted that the Court below erred when it relieved the Commission of its burden of proof, that in so doing, it failed to comply with the provisions of Section 10 of the Administrative Procedure Act, and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervision.

Conclusion

It is respectfully requested that this Court exercise its supervisory powers and that the writ be allowed.

December 22, 1948

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IN THE

Supreme Court of the United States

October Term, 1948

No. 477

ALLIED PAPER MILLS, *ET AL.*,
Petitioners,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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February 10, 1949

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

This brief is submitted in reply to the brief of the Federal Trade Commission filed herein on February 1, 1949.

Questions Presented By the Petition For Writ of Certiorari

The four questions presented by the petition are set forth in Petitioners' Brief (p. 11). The Commission has ignored two of those questions and has misstated the others (Com. Brief, p. 2).

The Commission's first question states an issue not raised by the complaint. The conspiracy alleged was one to restrict, restrain and suppress competition in the sale and distribution of book papers, by agreeing to fix and maintain *uniform prices* to customers generally, and by agreeing on bids to be submitted to the United States Government (Pet. Brief, p. 6, R. 10). The Commission evades this main issue and predicates its entire argument on the contention

that the combination was a general one to restrain and suppress price competition in the sale of book paper. It reviews the evidence from this point of view, in its Statement (Com. Brief, pp. 3-10) and in its Argument, Point I (Com. Brief, pp. 10-16). However, the evidence reviewed not only fails to support the existence of price uniformity as charged in the complaint but it also fails to support the existence of a combination in general, or of practices concertedly followed, having the capacity, tendency and effect of suppressing "price competition".

The Commission's statement of its second question misses the point which appears in Petitioners' Question No. 1. The question is not whether Section 10 of the Administrative Procedure Act expands the scope of judicial review, but whether the Court below complied with the provisions of the Act in reviewing this case.

The Commission ignores Question No. 3: Whether, apart from the Administrative Procedure Act, the findings and order of the Commission are supported by substantial evidence; and Question No. 4: Whether the Court below erred in its definition of "substantial evidence". The Commission has failed to meet these points in its brief.

ARGUMENT

POINT I

We did not contend in the Court below that it should weigh the evidence in this proceeding, and we do not ask this Court to do so. We have present here, not questions of fact, but a question of law, namely: Was there substantial evidence in the record to sustain the Commission's essential findings of fact? We are asking this Court to

follow the course it adopted in *Labor Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, relied upon by the Commission (Com. Brief, p. 11). There, the lower Court had set aside an order of the National Labor Relations Board on the ground that the record did not contain substantial evidence of violations of the National Labor Relations Act. This Court, on petition for certiorari, took the case for the purpose of determining whether the lower Court was correct in its conclusion. It reviewed the evidence, not to weigh it, but to determine "whether the evidence supported the findings of the Board * * *" (*National Labor Relations Board* v. *Waterman Steamship Corp., supra*, p. 220).

Neither the *Dietzgen* case [1] nor the *Fort Howard Paper* case [2] (cited by the Commission on page 11 of its Brief as examples of cases where writs of certiorari were denied) is similar on its facts to the instant case. The *Dietzgen* case involved express admonition and agreement to adhere to NRA price-filing procedures, and express agreements not to deviate from filed prices. The *Fort Howard* case is clearly distinguishable (Pet. Brief, p. 22; this brief, pp. 5, 7).

Alleged Price Uniformity. In this proceeding the Commission and Court below relied solely on one statistical study, dealing with spot sales to merchants of standard grades of book paper, to establish that prices in actual sales were substantially uniform. That study was made at the request of the Commission and upon conditions prescribed by the Commission (R. 1919). It covered two weekly periods or considerably less than 1% of the time (approxi-

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[1] *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321.

[2] *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. (2d) 899.

mately six years) during which the conspiracy is alleged to have existed (R. 10, 13). It dealt with prices of less than 28% of all book paper sold, and not with approximately 45%, as the Commission indicates (Com. Brief, p. 4).

We have discussed the evidence relied upon by the Commission and the Court below to establish the existence of substantial price uniformity (Pet. Brief, pp. 19-36). We pointed out that the additional evidence, statistical and otherwise, on this point fully supports our contention that the entire record establishes only that degree of price uniformity which would normally exist in a competitive market.

There is not a scintilla of evidence in the record to show substantial uniformity of *any* of the prices for book paper sold on contract, other than on bids to the Government, or in spot sales to others than merchants. As to Government bids, the uniformity had disappeared prior to the filing of the complaint (R. 211, 1405); and as to general contract business, the undisputed evidence establishes that there was no substantial price uniformity (R. 1158-59).

Trade Customs. The Commission argues that the trade customs, compiled and published by the Association in 1933, which contain certain price differentials, among other things, were the result of agreement. The Commission asserts that the 1936 publication of these trade customs made substantial changes in the earlier publication (Com. Brief, p. 12). These arguments have been answered (Pet. Brief, pp. 40-42). The Commission argues, further, that "even if it were true, as petitioners assert, that the 1936 publication was merely a more completely indexed reissue of its earlier publication, this post-NRA reaffirmation of agreements reached under the shelter of NRA was plainly illegal." (Com. Brief, p. 13). In support of this contention,

the Commission cites the *Dietzgen* case[1] and the *Ft. Howard Paper Company* case.[2] In the *Dietzgen* case, as in the *Ft. Howard Paper Company* case, there was no evidence of the existence of trade customs prior to NRA, and substantial evidence that they were adopted by agreement during NRA. The Commission's reliance upon these cases would have weight in this case only if the original compilation and publication of trade customs were the result of an agreement as to what those trade customs should be. The evidence in this case is wholly to the contrary.[3]

Furthermore, even if the NRA trade customs compilation had involved an agreement—which would of course have been lawful during NRA—the above cases do not apply, because in 1936 there was no agreement, but, in fact, the contrary. The record is replete with testimony to the effect that the trade customs were not employed except when their use was suitable to individual buyers and sellers.[4]

Quantity and Grade Differentials. The Commission in its Statement refers to quantity and grade differentials: It admits that the record does not show when these differentials originated, and only suggests that they have been changed or continued by cooperative action (Com. Brief, p. 6). We have discussed in our principal brief the extent to which quantity and grade differentials bear upon the issues here (Pet. Brief, pp. 48-49).

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[1] *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. (2d) 321.

[2] *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. (2d) 899.

[3] R. 50, 97, 114, 484-5, 505, 586, 613-14, 640, 667, 737-38, 804, 829, 871-72, 926, 940-41, 1023, 1070, 1201-02, 1256, 1327, 1343, 1374, 1375-76, 1394, 1442-43, 1517-18, 1523-24, 1531-32.

[4] R. 174, 213, 446, 448, 504, 530, 548, 710, 720, 755-56, 800, 854, 878-79, 1023, 1054, 1091, 1215, 1256, 1374, 1424.

Zoning. The Commission contends that a zoning system was adopted during NRA and was continued by agreement after the termination of NRA. We have answered this contention (Pet. Brief, pp. 43-46). The Commission refers to certain exhibits to indicate "The zone system was recognized and correlated with other Association action" (Com. Brief, p. 14, footnote 4). These exhibits demonstrate only that the zone method of selling was in somewhat general use by the end of 1935, and that this fact was recognized. These exhibits establish nothing as to the inauguration of the zone method or the basis for its continuance after NRA.

The Court below recognized that, although the zone method came into general use, it was applied with varying uniformity (R. 2287, Pet. Brief, p. 46). In addition, the Court below must have concluded that the evidence relating to the continuation of the zone method was of a tenuous nature, for it postured its decision upon the following proposition:

> "Moreover, a uniform participation by competitors in a particular system of doing business, where each is aware of the other's acts and where the effect is to restrain commerce, is sufficient to establish an unlawful conspiracy" (R. 2287).

We submit that this "legal-economic" doctrine is erroneous. It was challenged in our principal Brief (pp. 46-47). This doctrine was first enunciated in *Triangle Conduit & Cable Co., Inc., et al.* v. *Federal Trade Commission,* 168 F. (2d) 175. In that case this Court granted certiorari on January 31, 1949, to review the question raised by the doctrine above stated. *Clayton Mark & Co., et al.* v. *Federal Trade Commission,* 17 U. S. L. W. 3225.

With respect to what it refers to as the "zone system" and "the system of price differentials", the Commission

has made unwarranted assumptions, in the proposition quoted below:

> "When more than 40 manufacturers quote identical basic prices and employ both an identical zone system of pricing and an identical and complex system of price differentials, the inference of agreement is irresistible" [citing cases]. (Com. Brief, p. 11.)

In all the cases cited by the Commission in support of this proposition, the price lists contained prices at which the commodities of those industries were actually sold, with inconsequential exceptions, and not merely quoted, as in the instant case. This constitutes an essential distinction between this case and the cases cited by the Commission.

The record in this case establishes that trade customs, the zoning method of selling, and the general identity of price *quotations* of standard grades of book paper to merchants, were no bar, singly or collectively, to price competition. It is true that there was a general use of certain trade practices and selling methods, not inaugurated by agreement or with any understanding that they would be adhered to. It is true, also, that there were practices and methods used by companies, individually, with knowledge that other companies were generally using the same or similar practices, subject to deviation by anyone at any time. We submit that such general use of these trade practices was the controlling factor in the decision of the Court below and that it followed the erroneous "legal-economic" doctrine that such use was sufficient to establish an unlawful conspiracy. Therefore, the question presented for the review of this case is not different from that presented in *Clayton Mark & Co., et al.* v. *Federal Trade Commission*, certiorari granted, 17 U. S. L. W. 3225.

POINT II

The Commission has not attempted to meet the petitioners' point that the Court below in this case failed to comply with the substantial evidence rule contained in Section 10(e) of the Administrative Procedure Act. Instead, the Commission has indulged in an irrelevant discussion of whether that rule is the same as the substantial evidence rule applied by some courts prior to the enactment of the Administrative Procedure Act (Com. Brief, pp. 17-21).

As petitioners have shown in their main brief (pp. 13-19), Section 10(e) of the Administrative Procedure Act is the controlling statute with respect to the scope of judicial review of the actions of administrative agencies. It requires that the reviewing court shall hold unlawful and set aside agency findings and conclusions that are unsupported by substantial evidence; and that, in making its determinations in that regard, the Court shall review the whole record, or such portions thereof as may be cited by any party. The legislative history of this section of the Act reveals the Congressional intent (a) to reform the practice of administrative agencies of relying upon something less than substantial evidence—suspicion, surmise, implications or plainly incredible evidence, and (b) to place upon reviewing courts the duty of reviewing the whole record in order to form an independent judgment as to whether the administrative findings are supported by substantial evidence—a duty not to be fulfilled by searching the record "to see whether it is barren of any evidence, or lacking any vestige of reliable and probative evidence, or supports the agency action by a scintilla or by mere hearsay, rumor, suspicion, speculation or inference" (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 370).

That the Court below did not comply with the requirements of Section 10(e) of the Administrative Procedure Act has been demonstrated in petitioners' brief (pp. 57-64). The Court did not refer to its duties under the Act, although it emphasized its interpretation of the limitations on the scope of its review. The Court did not review the whole record, but looked only to the evidence relied upon by the Commission; it accepted the inferences of the Commission although the facts upon which they were based equally supported contradictory inferences, and despite the fact that the Commission's inferences were rebutted by other undisputed evidence.

It is the failure of the Court below to comply with the Act, by which petitioners are aggrieved. Whether the Act expands the scope of judicial review, or whether it is declaratory of pre-existing law is, therefore, not the fundamental question. Petitioners' point is that the Court below failed to comply with the statute, and therefore did not afford the petitioners the judicial review of the Commission's action to which they were entitled.

The Commission argues that Section 10(e) merely "adopts the language traditionally used" in stating the substantial evidence rule (Com. Brief, p. 18); but thereafter, the Commission recognizes that there were two different rules being applied at the time the statute was enacted, and argues that the Congress adopted the substantial evidence rule applied by some courts as opposed to the rule applied by other courts. The cases cited by the Commission (Com. Brief, pp. 20-21) in support of its proposition that Section 10(e) is "merely declaratory of well-established principles" do not support that proposition.

The Commission argues that the Court below has insulated itself from review by this Court by citing in its opinion

Federal Trade Commission v. *Algone Lumber Co., et al.*, 291 U. S. 67, 73 (1934) and *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, 63 (1927) (decided before the Administrative Procedure Act) which contain very general and summary statements of the rule that reviewing courts will not weigh the evidence. But that rule should not be allowed to interfere with the duty of a reviewing court under the Administrative Procedure Act to review the whole record to determine whether the findings are supported by substantial evidence.

In *Bridges* v. *Wixon*, 326 U. S. 135 (1945) Chief Justice Stone dissented from the majority opinion because he felt the administrative finding should not be set aside. He said in that regard (p. 178):

> "We cannot rightly reject the administrative finding here and accept, as we do almost every week, particularly in our denials of certiorari, the findings of administrative agencies which rest on the tenuous support of evidence far less persuasive than the present record presents."

In presenting the Administrative Procedure Bill to the House of Representatives, Congressman Walter, Chairman of the House Judiciary Committee in charge of the Bill, called attention to Chief Justice Stone's remarks and said:

> "Under this bill it will not be sufficient for the Court to find, as the late Chief Justice Stone pointed out within the year, merely that there is some 'tenuous support of evidence'" * * * (Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 370).

The Commission does not take cognizance of the intent of Congress, thus expressed, to reform administrative practice; it contends that Section 10(e) of the Act is meaningless and superfluous. The Commission pays no atten-

tion to the fact that the substantial evidence rule is the dividing line between law and arbitrary power (*National Labor Relations Board* v. *Thompson Products, Inc.*, 97 F. (2d) 13, 15 (C. C. A. 6th, 1938)); in effect, it argues that the Commission's findings shall be conclusive, no matter how tenuous the evidence upon which they are based.

It is submitted that the Commission's view of the Administrative Procedure Act is erroneous; that the Court below failed to comply with its provisions; and that petitioners have thereby been deprived of their right to judicial review.

Conclusion

It is respectfully requested that this Court exercise its supervisory powers and that the writ be allowed.

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February 10, 1949

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No. 477

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v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 2279) is reported in 168 F. 2d 600. The findings, conclusion, and order of the Federal Trade Commission (R. 2207-2250) are reported in 40 F.T.C. 696.

JURISDICTION

The decree of the Court of Appeals was entered on July 26, 1948 (R. 2293-2297). By order of a Justice of this Court of October 6, 1948, the time for filing a petition for a writ of certiorari was extended for sixty days or to December 23, 1948 (R. 2299). The petition for the writ was filed on December 23, 1948. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2101.

QUESTIONS PRESENTED

1. Whether there is substantial support in the evidence for the Federal Trade Commission's findings that petitioners were parties to a combination to restrain and suppress price competition in the sale of book paper.

2. Whether Section 10 of the Administrative Procedure Act expands the scope of judicial review in determining whether administrative findings are supported by substantial evidence.

STATUTES INVOLVED

Section 5 of the Federal Trade Commission Act, 38 Stat. 717, as amended by the Act of March 21, 1938, 52 Stat. 111, 15 U. S. C. 45, provides in part:

> (a) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful. * * *
>
> (c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. * * *

Section 10 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 237, 243, 5 U. S. C. 1009, provides so far as pertinent:

> Sec. 10. Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion——
>
> * * * * * *

(e) *Scope of review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act, the Commission charged petitioners with engaging in acts and practices to suppress price competition among them in the sale

of book paper in interstate commerce. Petitioners are the Book Paper Manufacturers Association, a voluntary, unincorporated association of manufacturers of book paper, its officers and representatives, and 41 corporate members of the Association. After a hearing, the Commission made findings of fact which may be summarized as follows:

The Association was organized in June 1933 to formulate and administer a code under the National Industrial Recovery Act. Its membership consists of about one-half of all domestic manufacturers of book paper, representing about 80% of the industry's productive capacity. (Fdg. 1(t-1), R. 2215). No concern produces more than 10% of the book paper output (Fdg. 7(a), R. 2227). About 55% of all book paper produced is sold through negotiated contracts, usually directly to users, and the remaining 45% is sold through spot sales, most of this to paper merchants who customarily handle the paper of more than one manufacturer (Fdg. 3(c), R. 2218).

Book paper is paper used in books, magazines, and pamphlets, and for other printing purposes. It may be coated or uncoated and may be made in many types, sizes, weights, and colors, and with many different special characteristics for particular uses. There is a rough classification of uncoated paper into five grades, and a similar classification of coated paper. Book paper may be bundled, or packed on a platform, or sold in rolls

or cases. Papers classified in one grade compete primarily with one another, but there may be competition between adjoining grades. (Fdg. 3(a), (b), R. 2217-2218.)

A long and complicated price list would result if prices were quoted for each possible combination of book paper offered by manufacturers. For a long period of years, variations from some designated standard unit have been quoted in terms of price differentials from the standard unit. At the time of NRA, these differentials and the practices affecting their application varied among manufacturers. A committee of the Association, by discussion and agreement, prepared a standard schedule of price differentials which were adopted by the Association and published as "Trade Customs". In May 1936, the Association adopted a revised set of "Trade Customs," making substantial revisions of those earlier adopted. The matter of price differentials, arbitrary figures used for determining all prices except the base price, has been frequently considered by the Association. The differentials thus promulgated are in general use by petitioners, who have thus united upon a common set of differentials to be used by all regardless of their application to the particular circumstances of a manufacturer. (Fdg. 4, R. 2219-2221.)

Before 1933 there was no uniform pricing method in use by petitioners, and delivered prices, f.o.b. mill prices, zone prices, and partial or full freight

allowance prices were all in use. The Association, following discussion and agreement, adopted for recommendation to NRA a zone system originated by petitioner Champion Paper and Fibre Company. This system divided the country into four zones, and provided for the addition of price differentials of 20, 40, and 60 cents per hundred-weight, respectively, for Zones 2, 3 and 4 above the eastern or Zone 1 base price. After the termination of NRA, the zone system was continued in use by mutual understanding and consent, and is now in general use by respondents. (Fdg. 5, R. 2221-2223.)

Identical quantity differentials, recognizing five different quantity brackets, are in use by petitioners. The record does not show when the differentials were established but, from evidence showing discussion of them in Association meetings, and from other facts of record, the Commission infers they were established as a result of cooperation and understanding among petitioners. There are also uniform price differentials between so-called standard grades of both coated and uncoated paper. While there is no specific showing as to the exact origin of these differentials, they are in common use and changes in them, when made, have been general. Minutes of Association meetings strongly suggest that the price differentials between grades are the result of cooperative action. (Fdg. 6(a)-(c), R. 2223-2227.)

Despite the variety of petitioners' products and

the great number of different prices resulting from product differences in size, weight, finish, color, trim, packing and quantity, the question of price uniformity is reduced to the single element of base price, through the use of standard quantity, grade, and zone price differentials. Petitioners' price lists show identical base prices. They have succeeded in maintaining price uniformity to a remarkable degree. Statistical studies of spot sales of book paper made by petitioners for two one-week periods, ending April 3, 1937, and July 16, 1938, respectively, show that for the 1937 period 85% of the sales, representing 72% of the tonnage and 76% of the dollar value, were in agreement with the price list. For the 1938 period, 86% of the sales, representing 78% of the tonnage and 80% of the dollar value, were in agreement with the price list. (Fdg. 7(a), R. 2227-2228; Fdg. 7(h), R. 2239.)

After the demise of NRA, petitioners pledged continued cooperation to the Association. Many continued to file announcements of price changes with the Association, some announced price changes at Association meetings, and some sent their new price lists to competitors. The Association held regular monthly meetings which were usually well attended. Association officials prepared charts and data showing price trends of various elements of cost in producing book paper, and the price trends in book paper as compared with other com-

modities. Testimony of those who attended Association meetings insisted that discussions were limited to the relationship of book paper prices to costs and to prices of other commodities, but these discussions of price plainly afforded a means of reconciling differences in view and arriving at a common course of action. And documentary evidence in the form of correspondence by various petitioners shows that the discussions at Associations' meetings were not confined to generalities but led to understandings and agreements upon specific matters. During most of the period covered by the complaint, petitioners were aware that they were under informal investigation by the Commission. The minutes of the Association meetings were carefully edited by counsel, and are vague and at times demonstrably incomplete. (Fdg. 7(a)-(h), R. 2227-2239.)

The United States Government Printing Office, a regular and substantial purchaser of book paper, which formerly solicited sealed bids for its requirements of paper, received identical bids, both during and after NRA, and allocated contracts for its requirements among the identical bidders upon the basis of quantities sold to the Printing Office in prior years. Complaints from bidders with no prior record of sales entitling them to participate in the awards, caused a change to determining awards by lot. Identical bids persisted until the Government Printing Office adopted the practice

of making no awards in cases of tied bids, but of purchasing its book paper requirements on the spot market. (Fdg. 8(a), R. 2239-2240.)

In November 1937, Walsh, a paper merchant authorized by petitioner Allied Paper Mills to bid on Government business, submitted bids on eight lots of book paper, which in each instance were about 1% lower than other bids. There was an average of about twelve other bids on each of the eight lots, all but two of which were identical with other bids for the same lot. The contract was awarded to Walsh as low bidder, but petitioner Allied and other petitioners refused to supply him the book paper to fulfill the contract. The Director of Purchases of the Government Printing Office testified that various sources in the industry informed him that Walsh would have difficulty getting paper. Eventually petitioner Allied furnished Walsh about half of the total. From this Walsh incident, as well as other reactions of petitioners to other low bids, the Commission concluded that petitioners had understandings and agreements concerning the prices to the Government Printing Office. (Fdg. 8(c) R. 2242-2245.)

The capacity, tendency, and effect of petitioners' combination and practices were to suppress price competition by the establishment of uniform prices (Fdg. 10, R. 2246).

The Commission concluded that petitioners' acts and practices constituted unfair methods of com-

petition in commerce within the intent and meaning of the Federal Trade Commission Act. It ordered petitioners to desist from carrying out any agreement, understanding, combination, or planned common course of action to (1) fix prices or terms or conditions of sale for book paper, (2) exchange price lists or information for the purpose of restraining price competition, (3) fix price differentials or use those previously fixed, (4) establish zone prices or use those previously established, or (5) use uniform forms of sale contracts in support of things prohibited by the order (R. 2247-2250).

The court below, after a careful and detailed review of the entire record, unanimously concluded that the Commission's findings were supported by substantial evidence, and ordered the Commission's order enforced (R. 2279-2291).[1]

ARGUMENT

I

Apart from the unsubstantial questions claimed to derive from the Administrative Procedure Act (*infra*, pp. 17-21), the petition presents merely the normal question whether there is adequate evidentiary support for the Commission's findings of

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[1] The court concluded that there was not substantial evidence to support a finding that Consolidated Water Power & Paper Company was a party to the combination or concerted activities, and vacated the Commission's order as to it (R. 2289-2290).

combination and unfair practices in the suppression of price competition. No adequate basis for review is thus shown since this Court will not ordinarily grant certiorari to review questions of fact. *National Labor Relations Board* v. *Waterman Steamship Corp.*, 309 U. S. 206, 208. This Court recently denied certiorari in two cases of precise similarity, each involving the propriety of findings by the Commission that business rivals had, through the medium of a trade association, concertedly maintained practices originated during the NRA period in order to suppress price competition. *Eugene Dietzgen Co.* v. *Federal Trade Commission*, 142 F. 2d 321 (C. A. 7), certiorari denied, 323 U. S. 730; *Fort Howard Paper Co.* v. *Federal Trade Commission*, 156 F. 2d 899 (C.A. 7), certiorari denied, 329 U. S. 795.

The careful analysis of the record made by the Court of Appeals conclusively establishes that there was ample evidence of probative value to support the Commission's findings. When more than 40 manufacturers quote identical basic prices and employ both an identical zone system of pricing and an identical and complex system of price differentials, the inference of agreement is irresistible. *Federal Trade Commission* v. *Cement Institute*, 333 U. S. 683, 715-716; *Milk & Ice Cream Can Institute* v. *Federal Trade Commission*, 152 F. 2d.478 (C.A. 7); *United States Maltsters Ass'n.* v. *Federal Trade Commission*, 152 F. 2d

161 (C.A. 7); *Fort Howard Paper Co.* v. *Federal Trade Commission, supra.*

Petitioners offer only unconvincing explanations for the identity of their quoted prices—an identity which is striking because, in view of the wide variety of book paper products, it is made possible only by application of numerous "price differentials" to the basic prices for designated standard units. The Commission found that before 1933 these price differentials and practices affecting their application varied among book paper manufacturers, but that at the time of NRA a committee of the Association, by discussion and agreement, prepared a standard schedule issued under the designation "Trade Customs" (Fdg. 4(a), R. 2219). In May 1936 the Association adopted and published a revised set of "Trade Customs" which made substantial changes in the earlier publication, including changes in details of applications and in actual price differentials, and the addition of working formulas and new price differentials (Fdg. 4(b), R. 2219-2220).[2] Clearly, here alone is suf-

[2] The substantiality of the differences may be demonstrated by a comparison of the 1933 and 1936 editions (Comm. Exs. 46 and 47, unprinted but on file with this Court). The following are indicative, but not exhaustive, of the numerous changes made: there are new classifications for regular sizes of both uncoated book paper (cf. Ex. 46, pp. 2-3, with Ex. 47, p. 2), and of coated book paper (cf. Ex. 46, pp. 12-13, with Ex. 47, p. 9); there are variations in special charges for finishing uncoated book paper (cf. Ex. 46, pp. 8-9, with Ex. 47, pp. 5-6); the charges for packaging uncoated book paper in flat bundles and on skids were changed (cf. Ex. 46, p. 9, with Ex. 47, p. 7); in the 1936 Edition of the Trade Customs regular sizes for

ficient evidence to warrant a conclusion that petitioners were engaged in illegal, competition-suppressing price-tampering. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150. And, even if it were true, as petitioners assert (Pet. 41) that the 1936 publication was merely a more completely indexed reissue of the earlier publication, this post-NRA reaffirmation of agreements reached under the shelter of NRA was plainly illegal. *Eugene Dietzgen Co.* v. *Federal Trade Commission, supra; Fort Howard Paper Co.* v. *Federal Trade Commission, supra.*

As to the zone system of pricing, a system adopted by all petitioners during NRA although previously a variety of pricing methods had prevailed (Fdg. 5(a), R. 2221-2222), petitioners press the view that it continued as a result of inertia and of general satisfaction with the system and without any form of joint implementation or mutual consent. While the arbitrary and artificial nature of the system in general use of itself permits an inference of agreement,[3] there is direct evidence in

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coated one-side paper were added (see Ex. 47, pp. 9-10); the 1936 Edition added a provision that open accounts unpaid in 30 days carried 6% interest from due date (see Ex. 47, p. 23).

[3] The four zones established, with differentials of 20, 40, and 60 cents per cwt., respectively, for Zones 2, 3, and 4 added to Zone 1 basic prices, were: North Dakota, South Dakota, Nebraska, Kansas, Oklahoma, Arkansas, Louisiana, Mississippi, Alabama, Georgia, South Carolina, and Florida constituted Zone 2; all states north and east of Zone 2 comprised Zone 1; all states west of Zone 2 constituted Zone 4 except that Wyo-

the minutes of the Association showing agreement to continue the zone system of pricing.[4] As to other evidence indicating concerted action on prices, it is enough to point out that the Court of Appeals found the record "replete with documentary evidence composed of correspondence, Association minutes, and oral testimony, from all of which combination and conspiracy is the reasonable, if not required, conclusion" (R. 2287).[5]

Petitioners urge that, even conceding the identity of prices *quoted* by manufacturers, this identity resulted from the forces of competition and also that there was no identity in actual sales prices.

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ming, Colorado, and Texas constituted Zone 3. In the *Fort Howard* case, *supra*, the court said (p. 906): "—the zoning system arose under the NRA, which fact saved its illegality for the statutorily exempt period. When that immunity was lifted, the illegality was again apparent and it is more than an inference to say that parties continuing to utilize that zoning system, born of agreement, suddenly utilized it in order to meet competition, rather than by tacit agreement."

[4] The zone system was recognized and correlated with other Association action. Thus a recommendation of the Association's Executive Committee, approved at a general meeting of November 1935, six months after NRA, in suggesting certain changes in price differentials, stated: "For Zones 2, 3 and 4 the regular zone differentials will apply" (Comm. Exs. No. 98-B, 98-C, R. 2100-2101). Minutes of an Executive Committee meeting in October 1936 show reference to the Trade Customs Committee of "the question relative to the application of light weight differentials" (Comm. Ex. No. 89, R. 2098). The forms furnished its members, after the demise of NRA, for filing prices contained the statement: "Price is for Zone 1, F.O.B. mill, carload rate of freight allowed" (Fdg. 7(b), R. 2228-2229).

[5] Findings 7(g) (R. 2234-2239) and 8(b), (c) (R. 2240-2245) quote many examples of documentary evidence directly evidencing price-fixing.

This argument seems irrelevant since agreement to tamper with prices, quite apart from its effectiveness, is illegal. *United States* v. *Socony-Vacuum Oil Co., supra,* at pp. 225-226. But the Commission found, on evidence which was clearly ample, actual price uniformity to a remarkable degree (Fdg. 7(h), R. 2239). The evidence consisted of statistical studies of spot sales of book paper, a summarization of which is set forth, *supra,* p. 7. Petitioners now make the odd contention that the weeks selected for study were unrepresentative, the first because it was a period of brisk business and rising prices, and the second because it was a slack period of very low prices. Obviously, it is in such relatively abnormal periods that the greatest variance between list and actual prices may be expected.

Petitioners also suggest that, in any event, the evidence showed concerted price-fixing only as to spot transactions and not as to negotiated contracts, which constituted the bulk of the book paper business. Even if this were true, it would not follow that the Commission's order was so broad as to require revision. Cf. *Jacob Siegel Co.* v. *Federal Trade Commission,* 327 U. S. 608. When the proclivity to fix prices is demonstrated by the fact of fixed prices as to a large segment of the market, the Commission would be on firm ground in ordering a cessation of concerted activities involving price-tampering as to all segments of the market.

Cf. *International Salt Co.* v. *United States,* 332 U. S. 392. In any case, it is clear that the Commission found that the petitioners' illegal activities were comprehensive and included activities relating to negotiated contracts.

Government business was not spot business, and yet petitioners do not deny that they submitted identical, though sealed, bids in response to invitations to bid. The theory that petitioners became accustomed during NRA days to bid identically on Government business, and continued this conduct as a matter of habit and as proof to commercial users that list prices were maintained, is unconvincing of itself, and particularly unconvincing in the light of the Walsh episode, *supra,* p. 9. As additional clear evidence that the Commission properly found that the combination suppressed price competition in contract, as well as spot, business, we point to the following uncontested findings: The Association prepared and approved a standard form of contract which is regularly used by many of its members (Fdg. 7(d), R. 2231); the Association adopted in November 1935 a clarification in the application of the 10 cent price differential between spot orders and contract orders (Fdg. 6(a) R. 2224); the price changes which petitioners filed with the Association on forms provided by it or mailed to their rivals were not limited to prices on spot business (Fdg. 7(b), R. 2229).

II

Petitioners assert that the Court of Appeals erroneously discharged its appellate function by ignoring and failing to apply Section 10(e) of the Administrative Procedure Act requiring a reviewing court to set aside administrative findings "unsupported by substantial evidence" (60 Stat. 243, 5 U.S.C. 1009(e)). Since the Court of Appeals plainly stated and exercised its function of review in accordance with long-established rules as to the scope of judicial review and in the light of such precedents as *Federal Trade Commission* v. *Algoma Lumber Co.*, 291 U. S. 67, and *Federal Trade Commission* v. *Pacific States Paper Trade Association*, 273 U. S. 52, petitioners' contentions necessarily assume that the Administrative Procedure Act expands the pre-existing scope of judicial review and requires something more, in terms of weighing the evidence, than a determination upon the record that the Commission's findings are predicated upon substantial evidence of probative value. Our answer to petitioners' contentions is that the relevant section of the Administrative Procedure Act was plainly declaratory of the existing "substantial evidence" rule, and that no question worthy of consideration by this Court is thus presented.

Section 10(e), in requiring courts to set aside those findings "unsupported by substantial evi-

dence", adopts the language traditionally used in stating the rule, and its legislative history abundantly reflects Congressional intention that it was a restatement, and not an expansion or limitation, of existing law. The Act was drafted largely by representatives of the American Bar Association, working with representatives of the Department of Justice, under the supervision of the Senate and House Judiciary Committees. The views of the Chairman of the American Bar Association's Special Committee on Administrative Law, Mr. Carl McFarland, testifying before the House Committee on the Judiciary, are therefore entitled to peculiar weight. He testified as to his belief that "the scope of review should be as it now is," and that the language of the provision in question "reflected the present judicial rule". Sen. Doc. No. 248, 79th Cong., 2d sess. "Administrative Procedure Act, Legislative History," pp. 84, 86. The written view of the Attorney General placed before both Committees on the Judiciary and entitled to weight since uncontradicted (see *American Stevedores* v. *Porello,* 330 U. S. 446, 452), was to the effect that Section 10(e) "declares the existing law concerning the scope of judicial review." *Id.* at 230.

While the reports of the Judiciary Committees do not explain Section 10(e) in comparison with pre-existing law, the interpretative comments make it clear that the section was no more than a restate-

ment of a well-established principle.[6] Thus, both reports, in commenting upon what constitutes "substantial evidence", describe it as requiring something more than reliance upon "suspicion, surmise, implications, or plainly incredible evidence." Senator McCarran and Representative Walter, sponsors of the measure in Senate and House, likewise explained the language of Section 10(e) in the phraseology of existing judicial decisions, and neither suggested that any departure from pre-existing principles was contemplated.[7] It is true that Representative Gwynne at one point agreed that Section 10(e) was "a change from the practice that is now in effect in regard to some agencies" (Sen. Doc. No. 248, p. 375), but his fuller comment makes clear that his interpretation of Section 10(e) accorded with such expressions of existing law as that set forth in *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 229-230. Thus, he stated (Sen. Doc. No. 248, page 375):

> I might say rather briefly that there are two conflicting theories that have often been expounded by the courts. One is that if the verdict of the jury or if the finding of the triers of fact is sustained by a scintilla of evidence,

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[6] S. Rept. No. 752, 79th Cong., 1st Sess., reproduced in Sen. Doc. No. 248 at 185. H. Rept. No. 1980, 79th Cong., 2d Sess., reproduced in Sen. Doc. No. 248 at 233. The discussions of Section 10(e) are given at pages 216-217 and page 279, respectively.

[7] See Sen. Doc. No. 248 at p. 325 for Senator McCarran's remarks; at p. 370 for Representative Walter's.

> any evidence, no matter how lacking in probative force, the court must sustain it. The other is that the court need not sustain a finding unless it is supported by substantial evidence. The latter is the view adopted in this bill.

There is no merit in petitioners' argument that the instant case warrants review because lower courts have disagreed as to the interpretation of Section 10 of the Administrative Procedure Act. *Olin Industries, Inc.* v. *National Labor Relations Board,* 72 F. Supp. 225 (D. Mass.), and *Snyder* v. *Buck,* 75 F. Supp. 902 (D.D.C.), the cases petitioners cite as conflicting, do not refer to the problem of the *scope* of review under subsection (e) of Section 10, but are interpretations of other subsections as to the *right* of review.[8] We are unaware that there is any expressed doubt or disagreement among the lower Federal courts as to the interpretation of Section 10(e). Those courts which have considered the problem have held or implied that the subsection is merely declaratory of well-established principles. *Anderson* v. *Commissioner of Internal Revenue,* 164 F. 2d 870, 874 (C.A. 7), certiorari denied, 334 U. S. 819; *Delta Stevedoring Co.* v. *Henderson,* 168 F. 2d 872, 874 (C.A. 5);

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[8] In *Kirkland* v. *Atlantic Coast Line R. Co.,* 167 F. 2d 529 (C. A. D. C.), certiorari denied, 335 U. S. 843, this Court denied certiorari although petitioner's claim for issuance of the writ was predicated on an asserted conflict of decisions respecting the *right* of review under Section 10 of the Administrative Procedure Act.

Lang Transportation Corp. v. *United States,* 75 F. Supp. 915, 925 (S.D. Cal.); *Wettre* v. *Hague,* 74 F. Supp. 396, 400 (D. Mass.), reversed on other grounds, 168 F. 2d 825 (C.A. 1); *United States* v. *Watkins,* 73 F. Supp. 216, 219-221 (S.D. N.Y.), reversed on other grounds, 164 F. 2d 457 (C.A. 2); cf. *Lincoln Electric Co.* v. *Commissioner of Internal Revenue,* 162 F. 2d 379, 382 (C.A. 6).

CONCLUSION

The decision below is correct and there is no conflict of decisions. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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